

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,792

389

WASHINGTON, MARLBORO & ANNAPOLIS MOTOR LINES, INC.,
(also known as W. M. & A. Motor Lines, Inc.) a body
corporate, *Appellant*

v.

EDITH O. MASKE, *Appellee*

**Appeal from the United States District Court
for the District of Columbia.**

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED OCT 26 1950

Joseph W. Stewart

CLERK

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EDITH O. MASKE, *Appellee*

**Appeal from the United States District Court
for the District of Columbia.**

JOINT APPENDIX.

I.

**PLEADINGS, DOCKET ENTRIES AND OTHER
PAPERS.**

498

Filed Jan 14 1949

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 4716 - 47

EDITH MASKE, 6060 Brooks Road, S. E., Washington, D. C.,
Plaintiff

v.

WASHINGTON, MARLBORO & ANNAPOLIS MOTOR LINES, INC.
(also known as W. M. & A. Motor Lines, Inc.) a body
corporate, 403 - 11th Street, N. W., Washington, D. C.
andGLADYS PAGE, 4911 - V Street, S. E., Washington, D. C.,
*Defendants***Amended Complaint for Personal Injuries
(Passenger in Bus)**

1. Plaintiff is a citizen of the United States and a resident of the District of Columbia; that the defendant Washington, Marlboro & Annapolis Motor Lines, Inc. (also known as W. M. & A. Motor Lines, Inc.), is a body corporate, having agents and doing business in the District of Columbia; that the defendant Gladys Page, is an adult citizen of the United States and a resident of the District of Columbia.

2. The matter in controversy is within the jurisdiction of this Court, in that the amount sued for is more than \$3,000.00 exclusive of interest and costs.

3. On, to-wit, July 9, 1947, at or near the intersection of 4th and E Streets, N. W., in the District of Columbia, the defendant motor lines, through its agent servant and em-

ployee, operated one of its vehicles in a careless and reckless manner, so as to cause serious and permanent injuries to the plaintiff, who at the aforesaid time and place was a passenger in said vehicle, a public automobile bus.

4. The defendant Gladys Page at the time and place aforesaid was also a passenger in said vehicle; that the defendant corporation, through its agent, servant and employee, operated said vehicle in excess of the speed allowed

by the traffic laws of the District of Columbia and
499 recklessly and negligently caused said vehicle to come to a sudden and abrupt stop, resulting in defendant Gladys Page's being forced against the body of the plaintiff; that the said defendant Gladys Page was careless and negligent in that she had failed to secure a firm and proper grip upon the railings and bars provided by the defendant corporation for the safety of standing and seated passengers; that the plaintiff at the time of the aforesaid occurrence was seated and the defendant Gladys Page was standing.

5. That as the result of the aforesaid negligence and carelessness of both defendants, the plaintiff sustained serious and permanent injuries to her body; that she also sustained shock, mental and physical suffering; that the plaintiff required the care and treatment of a physician for a longer period of time and is still under medical care; that she will require future medical care and will continue to suffer from said injuries; that she incurred hospital bills, other medical bills and expenses and will in the future continue to incur medical expenses; that she sustained loss of salary and will incur loss of earnings in the future.

WHEREFORE, the plaintiff demands judgment against both defendants, or either of them, in the sum of \$75,000.00.

MAURICE A. GUERVITZ

Attorney for the Plaintiff
Denrike Building

* * * * *

500

Filed Jan 31 1949

**Answer of Defendant Washington, Marlboro & Annapolis
Motor Lines, Inc. to Amended Complaint**

FIRST DEFENSE

The complaint fails to state a claim upon which relief may be granted against this defendant.

SECOND DEFENSE

This defendant admits that on July 9, 1947, a bus owned and operated by it on which the plaintiff was a passenger was traveling in an easterly direction on E Street, Northwest, Washington, D. C., between 6th and 5th Streets; that because of the recklessness and carelessness in the operation of a vehicle in front of said bus, it was necessary for the bus driver to apply his brakes in order to avoid a collision. This defendant denies that there was any negligence in the operation of the bus and is without knowledge or information sufficient to form a belief concerning the injuries and damages and the remaining allegations contained in the complaint not herein specifically answered.

HOGAN & HARTSON

By HOWARD BOYD

FRANK F. ROBERSON

*Attorneys for Defendant
Washington, Marlboro &
Annapolis Motor Lines,
Inc.*

810 Colorado Building
Washington 5, D. C.

* * * * *

502

Filed Apr 27 1949

Praecipe

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

the 27th day of April 1949

Civil Action No. 4716 - 47

EDITH MASKE

v.

WASHINGTON, MARLBORO & ANNAPOLIS MOTOR LINES, etc.

The Clerk of said Court will enter a voluntary dismissal
of the foregoing suit against defendant Gladys Page.

MAURICE A. GUERVITZ

Address Denrike Bld.

Attorney for plaintiff

* * * * *

502-A

Filed Apr 28 1949

Pretrial Proceedings**STATEMENT OF NATURE OF CASE:**

Action for personal injuries.

Plaintiff was a passenger in defendant's bus. The bus came to a sudden stop causing some of the standing passengers to fall. One of these passengers stepped on plaintiff's foot.

Defendant admits that the plaintiff was a passenger and that the bus came to a sudden stop. Defendant claims that this was done to avoid a collision. Defendant, further, claims that the other passenger stepped on plaintiff's foot after falling and while trying to right herself into her proper position.

Plaintiff claims she sustained a permanent injury to her right foot and has to walk on crutches.

Medical expenses claimed amount to \$1292.00; loss of salary claimed amounts to \$2,025.40 at the rate of \$10.66 a day for 190 days.

STIPULATIONS:

It is stipulated that the medical bills and statements which are being marked may be admitted in evidence without formal proof.

It is stipulated that traffic regulations, hospital records and x-ray photographs may be admitted in evidence without formal proof subject to objection as to relevancy and competency.

It is stipulated that plaintiff will furnish defendant's counsel with copy of Dr. Engh's report.

Plaintiff claims that the bus driver was negligent.

Defendant is to have a medical examination of plaintiff.

MAURICE A. GUERVITZ

Date April 27, 1949

Attorney for Plaintiff

PAU. R. CONNOLLY

Attorney for Defendant

ALEXANDER HOLTZOFF

Pretrial Judge

It is stipulated that certified copies of leave and employment records may be admitted in evidence without formal proof.

* * * * *

505

Filed May 16 1950

Verdict and Judgment

This cause having come on for hearing on the 10th day of May, 1950, before the Court and a jury of good and lawful persons of this district, to wit:

William B. Rumple

James L. Warwick

Lloyd O. Miller

Alice M. Jennings

Edith M. Cabell

Mary E. Jones

Hannah Dennison

James B. Smith

Frank Caggiano

Caroline A. Catlin

Mitchell B. McCorkle

Gertrude M. Holden

who, after having been duly sworn to well and truly try the issues between Edith O. Maske, plaintiff and Washington, Marlboro & Annapolis Motor Lines, Inc., a/k/a W. M. & A. Motor Lines, Inc., a body corporate, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 16th day of May, 1950, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendant by reason of the premises is the sum of twenty thousand (\$20,000.00) dollars.

WHEREFORE, it is adjudged that said plaintiff recover of the said defendant the sum of twenty thousand (\$20,000.00) dollars together with costs.

HARRY M. HULL,
Clerk,

By DOROTHY M. BARRICK,
Deputy Clerk.

By direction of
JUDGE McLAUGHLIN

* * * * *

506

Filed May 22, 1950

**Defendant's Motion for Judgment N. O. V. or, in the
Alternative, for a New Trial.**

Comes now the defendant and moves the court under Rule 50(b) to enter judgment in its favor on the grounds: (1) that there was no substantial evidence of negligence upon the part of the defendant to justify submission of the case to the jury; (2) that all the credible evidence affirmatively established that the defendant was free from negligence to such an extent that reasonable men could not differ thereon; (3) that the verdict was contrary to the evidence.

And should its motion for judgment n.o.v. be denied, defendant further moves the court to grant a new trial on the grounds: (1) that the verdict was contrary to the weight of the evidence; (2) that the court erred in failing to grant

defendant's motion to declare a mistrial upon plaintiff's revelation to the jury that Travelers Insurance Company was involved in the case; (3) that the court erred in failing to grant defendant's motion for a mistrial upon the plaintiff's statement that her husband was "mentally ill"; (4) that the court erred in failing to grant defendant's motion for a mistrial upon the plaintiff's statement that she was "not financially able" to get medical treatment for her ankle; (5) that the court erred in failing to grant defendant's motion for a mistrial upon the ground that the cumulative effect of the matters referred to in points 2, 3, and 4 was so prejudicial as to render a sympathy verdict inevitable and to preclude a fair and impartial trial; (6) that the excessive amount of the verdict establishes that passion, prejudice, bias or sympathy actuated the

507 jury's deliberation and its verdict; (7) that the court erred in admitting into evidence over defendant's objection, plaintiff's Exhibit No. 2, the so-called compilation from the records of Dr. E. W. Schwartze; (8) that the court erred in denying defendant's motion to amend the pretrial order upon the ground that modification was necessary to prevent manifest injustice; (9) that the court erred in excluding defendant's proffered evidence of the Walter Reed Hospital records which directly contradicted much of plaintiff's testimony; (10) that the court erred in admitting into evidence over defendant's objection traffic regulation Article VI, Section 34, relative to following another vehicle too closely; (11) that the court erred in refusing defendant's requested instruction No. 1 and instead in charging the jury in terms of the "highest degree of care"; (12) that the court erred in charging the jury the substance of *res ipsa loquitur* doctrine when the pleadings, pretrial order and trial of the case were upon the charges of specific negligence as to speed and sudden stop; (13) that the court erred in charging the jury that the duty was cast upon the defendant of showing that a sudden stop was caused by circumstances beyond its control while the bus driver was exercising the highest degree of care; (14) that the court erred

in charging the jury that the defendant must show: (a) that the driver had exercised the highest degree of care to avoid a perilous situation and (b) that when confronted with an unexpected crisis the driver exercised that degree of care required of a common carrier operator; (15) that the court erred in charging the jury in effect that a failure to anticipate the act of another driver may be violation of the highest degree of care standard; (16) that the court erred in failing to charge defendant's requested instruction No. 2 on sudden emergency and instead in erroneously instructing the jury about the burden upon defendant after an "unexpected crisis"; and for other and further reasons to be advanced upon the hearing of these motions.

HOGAN & HARTSON

By GEORGE D. HORNING, JR.

FRANK F. ROBERSON

Attorneys for Defendant

810 Colorado Building

Washington, D. C.

* * * * *

529

Filed Jun 30 1950

Order

A motion having been made to this court to enter a judgment non obstante verdicto, or in the alternative to set aside the verdict rendered in this cause, and to grant a new trial, and it appearing to the satisfaction of the Court from all the evidence and testimony adduced at the trial in open court, and from the oral argument on this motion that the verdict and judgment should stand, it is by the Court this 30th day of June, 1950

ORDERED, ADJUDGED AND DECREED:

1) That said motion to enter the judgment non obstante verdicto be and the same is hereby overruled and denied.

2) That said motion to set aside the verdict and judgment herein rendered, and to grant a new trial be, and the same is hereby overruled and denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That said verdict and judgment as entered by the Court will not be disturbed, but will stand and be entered of record.

CHARLES F. McLAUGHLIN,
Judge.

Copies mailed to
Attorneys of record

* * * * *

530 Filed Jul 11 1960

Notice of Appeal

Notice is hereby given this 11th day of July, 1950, that Washington, Marlboro and Annapolis Motor Lines, defendant above named hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the judgment of this Court entered on the 16th day of May, 1950 in favor of Edith O. Maske against said defendant.

HOGAN & HARTSON
By FRANK F. ROBERSON
Attorney for defendant
810 Colorado Building
Washington, D. C.

* * * * *

536 Filed May 16 1950

Defendant's Requested Instruction No. 1

The Jury is instructed that the defendant carrier was not an insurer of the safety of its passengers, its duty being to exercise that reasonable care and caution which would be exercised by a reasonably prudent and cautious person under the same or similar circumstances.

Hecht Co. v. Jacobsen, No. 10035, (D.C. Cir. Jan. 16, 1950).

Refused.

* * * * *

II.

EXCERPTS FROM TESTIMONY AND PROCEEDINGS.

3 Thereupon, **Edith O. Maske**, the plaintiff, called as a witness in her own behalf, being first duly sworn, was examined and testified as follows:

4 Direct Examination

 By Mr. Bress:

* * * * * * * *

Q. Are you married? A. Now?

Q. Yes. A. Yes, sir.

Q. With whom do you live at the address that you have given us? A. With my husband and my son.

* * * * * * * *

Q. Where are you employed? A. Veterans Administration.

5 Q. How long have you been employed there? A. I have been there five years.

Q. What is the nature of your employment? A. I am a supervisor.

Q. In what section? A. In the Civil Relief Section. We protect the soldiers and sailors and civilian insurance policies.

Q. Prior to July 9, 1947, had you sustained any loss of one of our lower limbs? A. Yes, sir, I did.

Q. When was that incurred? A. In 1945, at Walter Reed Hospital.

Q. Was that your left leg? A. Yes, sir.

Q. Was that amputated? A. Yes, sir.

Q. Can you just tell us why it was amputated, if you know? A. I had an injury from a gas explosion in 1929 and I neglected to have anything done to it. While my husband was overseas, I was asked by the Personnel Office of the General Accounting Office to go to Walter Reed and see if there couldn't be something done for me. I went there and came out an amputation; one on June 6 and another one on the same leg in August, 1945.

6 Q. That was as a result of an explosion that occurred in 1929 in Carolina, was it? A. No, sir, West Virginia.

Q. Following the amputations in 1945, how high is that leg amputated? A. Five inches below the knee.

Q. And how long have you been wearing an artificial lower limb? A. For five years.

Q. Between the time of the time that you began to use the prosthetic leg and the date of this accident which is approximately two years, will you state to the jury what was your ability to get around and walk? A. Well, I walked well. When I went to Veterans Administration, my chief, Miss M. L. Moore, did not even know I was crippled.

Q. Did you, between August of 1945, and July of 1947, wear stockings similar on both legs so it is difficult to ascertain you have an artificial limb? A. Yes, sir, to make both legs look alike.

Q. Between 1945 and 1947, were you able to attend your work regularly? A. Yes, sir—between when?

Q. Between the completion of your treatment at Walter Reed following the amputation in 1945 and the date
7 of this accident in July of 1947, I want to know whether you attended your work with some degree of regularity? A. I lost some work but it was not due to my physical condition. It was due to my husband who was mentally ill—

Mr. Roberson: May we approach the bench?

The Court: You may.

(Thereupon, counsel approached the bench and the following proceedings were had out of the hearing of the jury:)

Mr. Roberson: I move to withdraw a juror and declare a mistrial because the lady is injecting into this case an obvious effort to influence the jury and which will likely bring that result. It has nothing to do with this case and it is prejudicial error.

Mr. Bress: May I reply for the record?

The Court: Yes.

Mr. Bress: In my friend's opening statement to the jury, he went so far as to draw some nuances or innuendos that this lady was absent from work, particularly Mondays and Fridays and that she lost a lot of time before the accident.

The Court: I think I have heard enough.

I overrule the motion. I don't think it should be unduly stressed but I don't think it is error to produce evidence to the effect that the plaintiff's husband is suffering from an ailment, whatever it may be, which may cause her
8 to be away from work. Even a mental ailment is not sufficient to have the Court withdraw a juror and declare a mistrial at this time.

Mr. Roberson: I reserve my exception.

The Court: You have your exception.

Mr. Roberson: In order to minimize the injury that has been done, would Your Honor instruct the jury of the fact that the mental illness, which has come out in this case, is not to affect the jury one way or another as to the liability or amount of verdict in this case?

Mr. Bress: I would think there is no proper occasion for the Court to do that.

The Court: I see very little possibility of risk of prejudice but I am sure counsel could see no objection to it or, if he did, he could make objection if he sees fit but, in accord with the well recognized view of a certain attitude in the minds of people with respect to mental ailments, it might possibly have some effect. I think if it isn't stressed any more than it is now, than the reason for the plaintiff remaining at home to look after her husband, there would be no particular prejudice. I think, however, the request is not unusual nor unreasonable under the circumstances that I mentioned and I will so instruct the jury.

(Thereupon, counsel resumed their places at the trial table and the following proceedings were had in the hearing of the jury:)

9 The Court: Ladies and gentlemen of the jury, the point has been made at the conference which you saw at the bench that the reference by plaintiff, as the result of a question propounded by plaintiff's attorney, to the fact that the plaintiff's husband is suffering from a mental ailment might, in some way, prejudice the defendant's interests with the jury on the ground that it might arouse sympathy on the part of the jury for the plaintiff because of the fact that her husband so suffered from such an ailment or illness and the jury is instructed that the matter of any mental illness on the part of the husband of the plaintiff shall not enter into this case and shall not cause the jury to take any other view of the fact than if the evidence had not been produced so far as the mental illness is concerned.

Is that agreeable?

By Mr. Bress:

Q. I think the last question that you answered for me, Mrs. Maske, has already had to deal with your explanation of time off from work prior to this accident.

Now, will you tell the Court and the Jury, apart from the disability which you had as the result of the amputation what your general physical condition was prior to this accident during the period of two years that elapsed in between the amputation and this accident? A. Well, I

10 would say it was good because we live a half a mile from Capitol Heights and I can walk it in the evening, every evening I walked home from work.

Mr. Roberson: I object to that. She should answer the question and not make a speech.

The Court: The answer may stand.

Proceed.

By Mr. Bress:

Q. After the addition of this prosthetic limb and prior to this accident, will you tell the jury to what extent you engaged in walking? A. I just walked like any other normal person would. I rode the buses, rode the street cars.

Q. Between the place of your residence where your home is and the place where you would get off the bus or street car in returning from work or walking from your home to the place where you would get that kind of transportation, how far is that? A. One-half a mile.

Q. Prior to this accident, what was your process as to whether you walked that half a mile to and from work? A. If my son got home from school before I got there, he would meet me but if he did not, he could not meet me.

Q. What would you do? A. And I would walk it myself because there weren't any taxicabs.

11 Q. What about in the mornings? How did you get to the bus in going to work? A. My son would bring me to the bus.

Q. So that in the mornings, it was not necessary for you to walk? A. No, sir.

Q. Directing your attention now, Mrs. Maske, to the day of this accident, July 9, 1947, did you go to work that day? A. No, sir, I did not. I was on annual leave.

Q. What was the occasion of your being on the bus that day? A. I had gone to Veterans Administration to pick up my check. It was payday and I was leaving for West Virginia on a vacation to see my mother.

Q. What time of the day was it and where that you boarded the bus? A. I got on the W. M. & A. Bus on 11th Street between D and E, Northwest.

Q. Is that the place where the terminal is? A. Yes, sir.

Q. Was it your practice to board this bus at that place regularly prior to this day? A. Yes, sir.

Q. Did the route of that bus take you in an easterly direction on E Street? A. Yes, sir.

12 Q. Will you state to the jury where the bus last stopped prior to this accident? A. It stopped at 7th and E, Northwest, and picked up passengers, several of them.

Q. So that the record may be clear, the bus was proceeding east on E Street and, as far as you have gone so far,

it came to a stop at 7th and E to pick up passengers, is that correct? A. Yes, sir.

Q. When the bus left the terminal just prior to that, will you state to what extent there were passengers on the bus? A. All the seats were filled and passengers were standing. I would say they were standing middleways of the bus and more.

Q. That was at the starting point of the trip, is that correct? A. Yes; at the starting point of the trip it was crowded.

Q. Between 11th and E and 7th and E where this last stop was made, approximately four blocks would be covered. Do you recall how many stops the bus made during that four-block period to pick up passengers? A. It only made the one stop at 7th and E Streets because there weren't any other people waiting at the other stop
13 and they are not supposed to discharge passengers in the District of Columbia.

Q. What position did you take on the bus when you got on? A. I sat right behind the driver.

Q. And was that seat a long seat that was parallel to the side of the bus or was it a perpendicular seat facing forward in the same position the driver was? A. No, it was a long seat.

* * * * *

Q. Can you tell us, in view of the standing passengers on the bus which you said were half way back, how many passengers got on at 7th and E? A. I would say
14 between four and five got on.

Q. When the bus left 7th and E, will you describe to us to what extent it was crowded? A. They were standing then up until almost where I sat, to the pole that went up and down on my right.

* * * * *

Q. What was the position of the closest passenger standing near you? A. It was a lady that was standing

15 holding onto the seat. She just had her hand touching the seat, the first seat on the side that I was on.

Q. That was the left side? A. She was holding onto the arm that goes out there. There is a hold there.

* * * * *

Q. That being the position of the passengers in the bus at the time that it was stopped at 7th and E, will you continue and tell us from that point what happened until the time of this accident? A. He picked up these passengers at 7th and E Streets, Northwest. Of course, he waited for

the go sign and he went and he picked up speed
16 and he went at full speed, I thought, and he crossed over 6th Street because he had the go sign and there weren't any passengers there waiting. He knew nobody could be discharged so he speeded up again. He was going between 30 and 35 miles an hour. He came to 5th Street, along at the middle of the block I noticed the sign said "Caution" and I just wondered if he was going to cross it and he crossed it and it came to a complete stop, a violent stop, and this girl that was standing on the front holding onto the front seat, she was thrown so far she grabbed and grabbed for the poles as she went along. This one pole she grabbed for, if she hadn't finally made the second grab she would have been thrown clear through the bus. She had on white high-heeled shoes with leather heels and no taps on them and she just ground her heel in my ankle.

The bus driver went on. He acted like he was going to stop and then he didn't stop. He went on. He pulled over slightly like he was going to stop. Then he didn't stop and he went on to 4th Street and E Street before he ever stopped and took any names.

I was crying and begging him to stop and get a policeman and he wouldn't even call a policeman for me.

Q. All right, Mrs. Maske. You have described the manner in which the bus approached 5th Street and you said there was a caution sign. What do you mean by a

17 "caution sign"? A. Well, it was a yellow sign.

Q. What do you mean by "sign"? A. I mean the stop light.

Q. The stop light? A. The stop light, yes, sir.

Q. And by the caution light, do you mean the amber? A. Yes, sir.

Q. Before this bus entered the intersection, you say you saw the amber light on? A. Yes, sir.

Q. When the bus entered the intersection, was the light amber or otherwise? A. It turned red.

Q. How far did the bus get east of the intersection of 5th Street on E? A. It was just on the edge of it. I would say one-fourth of 5th Street when the light turned red.

Q. When the bus jammed on the brakes and stopped, was any part of the rear of the bus near the intersection or had it cleared the intersection? A. No, sir, it had never cleared the intersection.

Q. Was the bus then at the time it jammed on the brakes in the position of crossing the crosswalk at 5th and E? A. Yes, sir.

Q. Did you see any reason for the bus to stop? A. 18 I didn't see anything, no, sir.

Q. Was any warning of any kind given to you that this violent stop would be made? A. No, sir, there wasn't.

Q. Did the lady that stepped on your foot—was she thrown as the bus made the stop? A. Yes, sir.

Q. Were other passengers in the bus also thrown? A. Yes, sir.

Q. Were you thrown? A. Yes, sir.

Q. Was the stop anything like any other stop you had experienced while riding on buses? A. No, sir, it was not.

Q. When the lady stepped on your foot, did you experience pain? A. Yes, sir.

Q. Was it mild or severe? A. It was very severe.

Q. What did you say, if anything? A. I began to cry.

Q. Did you cry or say anything sufficiently audible so that the bus driver could hear you? A. Sure, I did. I begged him to stop.

19 Q. In the corner here just outside the courtroom, this corner is 5th and E and 4th and E is at that corner (indicating). Will you tell us where the bus stopped to take names? A. He acted like he was going to stop right out there and he didn't. He pulled on to 4th and E and the bus sign.

Q. When you say "sign", do you mean the stop light or the bus stop? A. The bus stop sign.

Q. When he came there, what did he do? A. He stopped and took out some pads and said "I am going to have to take some people's names" and he said, "Write down who all is hurt."

* * * * *

The Witness: I began to cry when I was hurt. Anyone would who was hurt. I don't know what I said. I begged him to stop. I begged him to stop and get a policeman to take me to the hospital and I told him I couldn't walk because I didn't have any legs then.

20 By Mr. Bress:

Q. That is what I wanted to know, whether you had told him you wanted him to stop? A. Yes, sir, it was well known to him that I was injured.

Q. Did he take the names of some other people on the bus, including you? A. He picked out a few names that he wanted. He didn't take everybody's name.

Q. The speed at which you said the bus was driving, will you state what the speed was at the time he jammed on the brakes? A. I would say it was between 30 and 35 miles an hour.

Q. Have you ridden in cars frequently during your experience? A. Yes; I used to operate an automobile myself.

Q. And you still ride in automobiles? A. Yes, sir.

Q. Do you feel that by riding in an automobile and looking how fast you traverse the ground that you have capa-

city for stating the approximate speed at which you are going? A. Yes, sir, I would.

* * * * *

22 Q. Mrs. Maske, just prior to the sudden stopping, as you have described it, was there any horn blown by the bus? A. No, sir, I didn't hear any.

* * * * *

Q. After you got to your destination—I take it you remained on the bus until you arrived at your destination? A. Yes, sir.

Q. How did you get home? A. I was helped off by two men at the bus stop and sat—there is a brick wall—like that goes around the school house and the bus stop is right at the school house in Capitol Heights—and they set me on this brick walling and one of the men called me a taxicab.

23 Q. Did you get home then by way of the taxicab? A. Yes, sir.

Q. When you got to your home, were you able to get out of the cab on your own power or did you have to be assisted? A. No, sir, my husband was there. He helped me out.

Q. Will you state whether or not you received any medical treatment that day? A. Yes, sir; Dr. Schwartz was called to our home immediately.

Q. Is that Dr. E. W. Schwartz? A. Yes, sir.

Q. Who died in November, 1947? A. Yes, sir.

Q. What time of the day was it when Dr. Schwartz arrived? A. It was around dark when he got there. He had been on an emergency call way out beyond Suitland, Maryland, somewhere.

Q. What time of the day was it that this accident occurred? A. It occurred between 4 and 4:09. The bus driver told us it was 9 minutes after 4 when we filled out our slips.

Q. What time of day was it when you got home? A. I guess it was something after 5 o'clock when I got home.

24 Q. What time was it when Dr. Schwartz arrived?

A. It was dark. It was around, I would say, 9 o'clock.

Q. What treatment did he prescribe for you on that occasion? A. Well, he put me to bed immediately and raised my foot because the swelling was very bad and he put some kind of bags underneath of them, sandbags, I think he called them, and raised my foot up, and put something on it.

Q. What was the appearance of your foot at that time?

A. It was all swollen and beginning to turn black.

Q. What part of your foot was turning colored? A. The right side, practically on top near the center.

Q. Did you furnish any treatment to yourself before Dr. Schwartz arrived? A. No, sir, I didn't.

Q. Did you call him promptly upon your arrival home? A. Yes, sir, I did.

Q. Did he apply any medication of any kind to your foot?

A. He put something black all over it. I don't know what it was.

* * * * *

25 Q. What did Dr. Schwartz do in addition to the sandbags and the medication on the outside of the foot? What other treatments did he prescribe on that first visit, without telling us what he said; just what he did. A. He put this black medicine all over it and he elevated my two feet higher than my head to get the swelling down and he didn't administer anything else.

Q. Did he call to see you at any time after that occasion? A. The next day.

Q. What was the condition of your foot that night with respect to whether or not you were suffering pain? A. Well, it still stayed swollen an awful lot and severe pain.

Q. Did you get out of the bed at any time during that night? A. No, sir, I didn't.

Q. How long did you remain in bed? A. I would say approximately three or four days.

Q. Was that without getting out for any purpose at all? A. Yes, sir.

Q. Were your needs taken care of by members of
26 your family? A. Yes, sir.

Q. Did you hire any nurse during that period?
A. My daughter is a nurse. She was called home from Arizona.

Q. Did she assist you at home during that period? A.
Yes, sir.

Q. Was she called home for that purpose? A. Yes, sir.

Q. Dr. Schwartz came to see you the next day. Will you tell us what, if any, difference there was in your condition the next day as compared to the night before, as you have described it? A. There wasn't very much more. My foot continued to stay swollen.

* * * * *

A. There seemed to be some bone broken because the swelling stayed and I had severe pain.

Q. How long did you remain in bed before some other kind of treatment was administered by Dr. Schwartz? A. It was approximately three days.

Q. And what was the new treatment that he administered at the end of that period? A. I was taken to his office and some kind of machine was used and a plaster Paris cast was put on me.

27 Q. When you say "some kind of machines were used," do you know whether they were X-ray or fluroscopic? A. Fluroscopic, I would say. I think fluroscopic, I am not positive.

Q. Was the cast applied at Dr. Schwartz's office? A. Yes, sir.

Q. How were you moved from your home to Dr. Schwartz's office? A. In an ambulance, Bladensburg Fire Squad Department.

Q. When you returned to your home, were you then confined to bed or were you able to get about the house? A. I was confined to bed then for two days.

Q. And thereafter, in what way were you able to move about? A. I was able to walk. They put a heel and a toe was put on my cast.

Q. Was that what is known as a walking cast? A. Yes, sir.

Q. A steel brace underneath it? A. Yes, sir.

Q. So you could put some weight on it? A. Yes, sir.

Q. How big was the cast? A. It came to my knee.

Q. How far down did it extend? A. It went entirely over my toes.

Q. So that it was completely covered like a boot? A. Yes, sir.

Q. Was the metal part on which you could put some weight was that underneath the cast? A. Yes, sir.

Q. In getting around after the cast was applied that tight, did you need any particular kind of support? A. I needed crutches.

Q. Did you use crutches prior to that time? A. No, sir, I did not.

Q. Following your amputation at Walter Reed in 1945, was there a period there in 1945 where you used crutches or a cane? A. Never was; no, sir.

Q. When you had the new limb attached to your left leg, were you able to walk in 1945 without the use of cane or crutches? A. Yes, sir. I came out of Walter Reed on Friday and went to work on Monday morning. I didn't either walk with a cane nor crutches.

Q. Did you use a cane or crutches between your discharge at Walter Reed Hospital and the day of this accident? A. No, sir; only to take a shower, I did use my crutches to take a shower.

Q. While in Walter Reed as a patient and before you were accustomed to the new limb, did you use crutches in getting about during that time? A. No, sir, I didn't because I didn't know how to walk on crutches.

Q. Then was your first experience with crutches following this accident in 1947? A. Yes, sir, it was.

Q. How long did the cast remain on your right leg? A. Well, the one that Dr. Schwartze put on, it wasn't left on very long because the swelling continued to be very severe

and it was removed. He took me to Providence Hospital, had me re-X-rayed and a new cast put on.

Q. Do you know approximately when that was? A. I would say it was—no, I would hate to say.

Q. Was it during July? A. Yes, it was during July.

Q. Do you know how long that first cast remained on, approximately, if you can tell us that? A. I would say almost two weeks.

Q. And when the new cast was applied, how long did that new cast remain on? A. Well, not too long because they put another one on me again.

30 Q. You mean a third cast. A. Yes, sir.

Q. Cast No. 2, that we will refer to as the first cast applied at Providence Hospital, was that cast also a walking cast with a steel brace underneath it? A. Yes, sir.

Q. Was Cast No. 3 a similar type of cast? A. Yes, sir.

Q. Were those casts of the same size, that is, did they extend as a boot from the toe to below the knee? A. No; the last two had the toes out.

Q. Was that the only apparent difference between them? A. That was the only apparent difference, only the last one was much heavier.

Q. Much heavier? A. Much heavier than the other two.

* * * * *

31 Q. Well, we will get to a detailed showing of what your condition is today but during the period of this month following the accident, did you return to work at all during that entire month from July 9 to early August? A. Well, sometime in August, I forget just when, I was called back because I was a supervisor and we had an awful lot of work to do.

Q. You went back sometime in August? A. Yes; because I was in a walking cast and my chief thought maybe I could come in and give some instructions to the employees.

Q. Did you go in wearing a cast? A. Yes, sir I did and walking on crutches.

* * * * *

32 Q. How old are you, Mrs. Maske? A. I was 42 in April.

* * * * *

36 Q. Did you sustain any mishaps while you were back at work which you have attributed to the injury to your foot? A. Yes, sir. Last summer, there was an electric fan fell off the wall and I was standing at a desk. Had I had two good legs, I could have moved out of the way but I couldn't move quick enough and it hit me. I was taken to the United States Public Health.

Q. What injury did you have from that? A. I received a wrist injury. I threw out my hand to protect myself.

Q. Did you get over that all right? A. Well, yes.

Q. Did you have any fall of any kind since you have returned to work that you have attributed to your inability to stand on that right foot and if so, will you state the circumstances of the fall and the time and place? A. Yes; I fell in the ladies' room one time.

Q. What were the circumstances of that fall? A. I just slipped and fell backwards.

Q. Were you on your crutches at the time? A. Yes, sir.

37 Q. Was there anything in the condition of the floor that caused you to slip? A. No, sir.

* * * * *

Q. Will you state the circumstances of the fall? A. I slipped on the floor and I guess I had walked there before and never had slipped, so I attributed it to my ankle.

* * * * *

41 Did you receive a bill from Dr. Schwartz for his services?

The Witness: I did.

Mr. Bress: I offer in evidence at this time the report of Dr. Schwartz which includes his bill.

Mr. Roberson: May we approach the bench?

The Court: You may.

(Thereupon, counsel approached the bench and the following proceedings were had out of hearing of the jury.)

Mr. Roberson: Your Honor, I ascertained from the gentleman's widow, that this E. W. Schwartz is not the doctor but the son who happens to have the same name. Of course, it would not be admissible, sir. I only learned that yesterday. Moreover, sir, it is not signed.

Mr. Bress: This objection comes far too late, if the Court pleases. I know the rules of evidences enough not to offer a medical report into evidence, but it was stipulated in the pre-trial hearing.

42 Mr. Roberson: We were told it was signed by the doctor and this is signed by his son.

Mr. Bress: It is in the pre-trial order.

The Court: In the pre-trial order, it is stipulated that medical bills and statements which are being marked may be admitted in evidence without formal proof.

Mr. Roberson: Your Honor, at that time we did not know that this alleged report signed "E. W. Schwartz" was signed by his son.

Mr. Bress: The report is not signed. It is an abstract of the doctor's records which was explained at the pre-trial hearing.

The Court: These are marked—

Mr. Roberson: Yes, Your Honor, but we did not know the facts with respect to it at the time.

The Court: It was not signed at the time.

Mr. Roberson: It was signed "E. W. Schwartz" and it was on his letterhead but it was not signed by that man and we were misled.

The Court: This is the instrument itself which was presented at pre-trial?

Mr. Bress: That is correct.

Mr. Roberson: I ask to avoid prejudice that this pre-trial order be amended. That report contains a long diagnosis by a boy who was not even a doctor.

43 The Court: Are you relying on the extent of the medical services—

Mr. Bress: Precisely.

The Court: —or are you relying on the statement? You are not seeking to introduce the statement in evidence?

Mr. Bress: That is what the stipulation was, that this report is admissible in evidence and we have no medical testimony to cover that period other than this report, and these gentlemen stipulated to that and it comes too late now to try to avoid it.

The Court: It is stated by counsel and it is upon the representation that at the time they entered into the stipulation at the pre-trial conference there were circumstances of which they were not aware and of which they have since learned, as I understand their representation to be. The Court would be of the opinion that you would have a right to consider the circumstances and, if they are as represented and no doubt would have been presented, or it is presumed they would have been presented to the pre-trial judge at the time had they been known, the Court might put himself in the same position as the pre-trial judge had been aware of those facts.

Mr. Bress: I submit the circumstances which prompted counsel at pre-trial to ask the Court to admit in evidence by stipulation a doctor's medical report was based on
44 these facts:

One, the doctor died in November of 1947 while he was treating this woman; that he had not submitted any report; that we do have a report based on his original records, and that is why the report is signed by "E. W. Schwartze" who is the son and also a doctor, I understand.

If these gentlemen want now to take the position that the original records are not consistent with the report, then I have no objection to them bringing the original records to Court, but this is the only kind of evidence that we can possibly produce covering that period and, having stipulated about it, I think that it is not subject to modification now unless there is a showing of grave prejudice. I do not think that such a showing has been made. All they are saying

now is that although they knew the man was dead, they didn't know it was not signed by him. It isn't signed by anybody. That was apparent to them when it was handed to them.

The Court: The Court observes in the letter attached to the report, which is signed by Mrs. E. W. Schwartz, by her name, Annie Andrews Schwartz, that the report is dated January 14, 1948, and that it states that is a copy of the report compiled from the records of Dr. Schwartz. There is no date on the doctor's statement or the statement to which reference is made in the letter, it being a compilation from the records of Dr. Schwartz.

45 Mr. Bress: That is right, sir. There is nothing different here today than there was at pre-trial.

The Court: There would not be any representation at that time that this was, although not signed, a copy of something from Dr. Schwartz which he had signed because it is manifestly a compilation from his records.

Mr. Bress: That is correct.

Mr. Roberson: But Your Honor, obviously counsel at pre-trial, in the position of the defendant, looked at this report. It is signed there "E. W. Schwartz," whether that is the original one he signed or not.

The Court: Reference in the letter says it is a compilation.

Mr. Roberson: It does not say who did it. You look at it and it is "E. W. Schwartz" and it is very misleading.

The Court: There is nothing in the compilation to represent that it was made by Dr. Schwartz. It was also signed by counsel at that time.

Mr. Roberson: It appears there with the word "signed" on the line for signature and "E. W. Schwartz" written underneath it.

The Court: But it is a statement compiled from Dr. Schwartz's records.

Mr. Roberson: Why would the "Signed: E. W. Schwartz" appear at all, sir?

46 The Court: Is the other doctor, E. W. Schwartz, the same name?

Mr. Bress: The same name.

Mr. Roberson: He is not a doctor.

Mr. Bress: But these gentlemen know, from the transmittal letter, this was never purported to be signed by Dr. E. W. Schwartz.

The Court: It would seem so to me.

Mr. Roberson: On the contrary, that was our understanding of it, and I ask now, to avoid prejudice, that the pre-trial order be amended to that effect.

The Court: The Court will overrule the request and will limit—

Mr. Roberson: I have no objection to the amount of his bill.

Mr. Bress: I am offering the letter itself, the medical report. That covers the treatments which we have stipulated. We have not brought the original records. I don't know that the original records are now available.

Mr. Guervitz: May I confer with Mr. Bress? I think I can clear this up.

Mr. Bress: I understand that the original records from which this is a compilation are still in the possession of the doctor's widow but, if the Court pleases, that is precisely what we wanted to stipulate at pre-trial and we have made that stipulation that this summary of the doctor's
47 records will be admitted in evidence as though they were his testimony.

The Court: I think the Court will overrule the objection and exception will be noted.

(Thereupon, counsel resumed their places at the counsel table and the following proceedings were had in the hearing of the jury.)

Mr. Bress: May the record show, if the Court pleases, that this report on the stationery of Dr. E. W. Schwartz attached to a letter of January 14, 1948, signed by the doctor's widow, the report itself being unsigned, is admitted pursuant to the stipulation by counsel?

Mr. Roberson: I stipulate nothing of the kind, Your Honor. I object to it and it is admitted over my exception.

The Court: It is admitted over the exception of counsel. (Plaintiff's Exhibit No. 2 was received in evidence.)

(Plaintiff's Exhibit No. 2 was read to the jury.)

Mr. Bress: The letter of transmittal sending that is signed by the doctor's widow and the transmittal letter is dated January 14, 1948.

* * * * *

Q. Mrs. Maske, with respect to the present condition of your leg, will you tell the Court and the jury, or will you demonstrate, first, to the Court and jury what motion
48 you have in that ankle and how far you can move that ankle? A. That is as far as it will work.

Q. Pull it down as far as you can get it forward. Is that as far as you can get it? A. Yes, sir.

Q. Will you pull it back this way as far as you can get it? A. That is as far as I can get it. Something seems to hold it.

Q. For the sake of the record, and you gentlemen did not observe, I say that the extreme of motion forward to the extreme of motion backward appears to be less than an inch, to the eyes of counsel.

Has that limitation of motion improved at all during the last year or two? A. No, sir, it has decreased.

Q. Are you getting any treatment now for it? A. No, sir, I am not financially able.

Mr. Roberson: May we approach the bench?

The Court: You may.

(Thereupon, counsel approached the bench and the following proceedings were had out of the hearing of the jury.)

Mr. Roberson: Your Honor, this is a repetition of a prejudicial error in that this time she is asserting
49 now her financial situation in an obvious effort to puff up the case and it cannot be cured by any instruction.

Mr. Bress: I submit, if the Court pleases, that the answer of the witness, nor was the question, calculated to create any prejudice or sympathy. I was looking to find out whether she was getting treatment. I was not sure of the answer, but her statement as to why she was not is a proper explanation with the condition that she has got and my knowing that the medical testimony will show she will need an operation to make a permanent fusion in the ankle, a complete ankylosis, and there must be some explanation of why she isn't getting any treatment.

The Court: I will overrule the objection and grant an exception.

* * * * *

57 Cross-examination

By Mr. Roberson:

Q. Mrs. Maske, what happened on July 9, 1947, was that the lady stepped on your instep, isn't that correct?

A. She stepped on my ankle.

Q. Wasn't it on the top of your foot?

A. Yes.

Q. Have you ever had anyone step on the top of your foot before?

A. No, sir, not that bad.

* * * * *

59 Q. I didn't understand your testimony about using crutches in a shower. When did that begin, your using crutches in the shower? A. After this accident.

Q. You had not used any from the time— A. I can't get in a bathtub now.

Q. When was your foot amputated, Mrs. Maske? A. In 1945.

Q. You say that was because of an accident in 1929? A. Yes, sir.

Q. You had your foot from 1929 to 1945? A. Yes, sir.

60 Did you have a new accident in 1945? A. No, sir.

Q. Had your foot become worse? A. No, sir.

Q. No worse in 1945 when it was amputated than it was back in 1929? A. I was crippled pretty badly in that foot, and I went to Walter Reed to see if they could do anything for me.

Q. And they amputated it? A. Yes, sir.

Q. That was the time? A. Yes, sir.

Q. You say the original accident was a gasoline stove explosion. A. Yes, sir, in 1929.

Q. In your own home? A. Apartment.

* * * * *

63 Q. And the bus stopped there and this lady got on?

A. Yes, sir.

Q. Where did she stand with respect to you? A. She stood at the first seat. The others went beyond her, and she stood at the first seat that faced towards the driver.

Q. You have a clear recollection of where she was standing? A. Yes, sir.

Q. How close was she to you? A. Well, she was standing back at the first seat, and I was sitting on the side seat.

64 Q. There is no question in your mind about where she was standing? A. Yes; she was standing at that first seat that faced the driver.

Q. On the same side of the bus as you were on? A. Yes, sir.

Q. Mrs. Maske, don't you remember coming up to my office about nine months after this accident and telling us how it occurred? A. Yes, I remember it.

Q. You were telling us to the best of your recollection about it? A. Yes, sir.

Q. Let me refresh your recollection by referring to page 28 of that deposition. I asked you this question:

"Q. Where was this lady standing whom you say fell against your ankle?

"A. Well, I can't say positively where she was standing because, after all, I don't know people. There are too many people riding these buses."

I asked you that question and you gave me that answer, didn't you? A. I guess I did.

Q. But you have since become positive where she
65 was standing? A. I have thought the accident all out
due to the fact that I had to know exactly when and
where.

Q. So you are surer of it now than you were about nine months after the accident on March 13, 1948. Is it clearer to you? A. Yes, sir, it is clearer to me.

Q. Do you recall that the bus stopped for the stop light at 6th Street? A. No, sir; there weren't any passengers getting on there.

Q. I didn't ask that. I asked if it stopped for a traffic light. There is a traffic signal at the intersection, isn't there? A. No, it didn't stop at the traffic signal. It had the go sign through 6th Street.

Q. You are certain of that? A. Yes, sir.

Q. Isn't it a fact, Mrs. Maske, that the accident happened just after it had passed 6th Street before it came to 5th? A. No, sir, it did not. It happened right at 5th Street.

Q. Couldn't you be wrong about that, Mrs. Maske? A. No, sir, I couldn't be wrong about that.

Q. Do you know where Georgetown Law School is?
66 A. Yes, sir.

Q. Where is it? A. It is on 6th, between 5th and 6th.

Q. It is on E? A. On E, between 5th and 6th.

Q. Isn't it a fact that this accident occurred somewhere around Georgetown University Law School? A. No, sir; upon my honor it did not.

Q. You couldn't be wrong about that? A. No, sir.

Q. Mrs. Maske, did you see this car pull out in front of the bus that had stopped? A. No, sir, I did not.

Q. You don't deny that that did not happen? A. No, sir, I don't.

Q. Were you looking ahead? A. Yes, sir, I was watching that stop sign, traffic light, I should call it.

Q. Were you looking in the same direction the bus was traveling? A. Yes, sir.

Q. And you say there was no car there? A. I wouldn't state positively there wasn't any car there because I was hurt.

Q. Did you look before the accident? A. But I
67 didn't see a car there. I looked before the accident and I didn't see any.

Q. Did you again look after the accident? A. I was hurt so badly that I didn't look, no, sir.

Q. Were you looking at the time the bus came to the sudden stop, as you have characterized it? A. Yes, sir, I was.

Q. And there was no car there then? A. No, sir.

Q. What lane of travel was the bus in with respect to the curb and the middle of the street? A. It was in the center lane.

Q. In other words, there was a lane of parked cars to his right, and a lane of moving traffic to his left, and he was in between those lanes? A. Yes, sir.

Q. What gear was the bus traveling in at the time of the accident? A. I couldn't tell you that.

Q. He had not gathered maximum speed, had he? A. He had, indeed. He was traveling at a high rate of speed because he had the go sign at 6th Street.

Q. Did he slow down for that intersection? A. No, sir.

Q. How about for the 5th Street intersection? A.
68 No, sir; he had the caution sign which was on at the traffic light, and I just watched to see if he was going to cross that light, and he did.

Q. Which traffic light are you referring to? A. The caution, the yellow.

Q. At which intersection? A. At 5th Street, where the accident occurred.

Q. And you are sure that is the traffic light you mean?
A. Yes, sir, I am.

Q. Mrs. Maske, previous to today, you have told other people there was a near collision with a car which caused your fall, haven't you? A. I have not.

* * * * *

By Mr. Roberson:

Q. Specifically, you told Dr. Schwartz, your own physician, there was a near collision, didn't you? A. I did not, no, sir.

Q. Do you recall on July 17, which would be nine days after this accident, that representatives of the defendant came out to see you at your home? A. No, sir, I do not.

Q. You don't deny he came out to see you, do you?
69 A. Yes, sir, I do.

Q. I wish to refer you to his name, Mr. J. P. White.
A. I am sorry, I didn't see him.

Q. You are certain he didn't come and talk to you? A. Absolutely.

Q. Didn't you sign a paper for him at that time about this accident? A. No, sir.

Q. I show you a paper and ask you if that is not your signature? The paper is dated July 17, 1947. A. That is my signature and that is a piece of paper that come from my home.

Q. You signed that, did you? A. That is my signature, but I signed it for Dr. Schwartz.

Q. That is likewise your handwriting, isn't it, the whole statement? A. Absolutely not, no. That is my signature, though.

Q. That appears on the last line of this statement? A. Yes, sir, but I did not write that. That is not my writing, but that is my signature.

Q. Was the writing on the paper at the time you signed it? A. No, sir, it was not.

70 You signed a blank piece of paper? A. Yes, sir, for Dr. Schwartz, because he said that the W. M. & A. wanted to check to see if I was the same person that

was injured that signed the slip on the bus and was injured was his patient.

Mr. Roberson: I will ask that this statement be marked Defendant's Exhibit 1 for identification.

(The document was marked Defendant's Exhibit No. 1, for identification.)

* * * * *

Q. Can you answer my question whether she stepped on your foot when she swung forward or after she had completed her swing forward in trying to regain her balance?

A. No, sir, she swung forward. She would have gone right through the front of the bus if she had not regained her grip. She not only stepped on my foot once, but three times.

71 Q. All on the top of your foot? A. Yes, sir.

* * * * *

Q. You say that other people on the bus were thrown? A. Yes, sir.

Q. Besides this lady. Did you see them outstretched? A. I wouldn't say they were thrown down, but they were thrown.

Q. What do you mean by "thrown"? A. Well, they all grabbed for something and some of them, I couldn't see because I was hurt.

Q. You testified that people were thrown. A. Yes, sir.

Q. Do you know whether they were thrown out of their seats or on the floor or whether they were thrown at all? A. They were thrown, yes, sir.

* * * * *

72 Q. Mrs. Maske, I believe you testified here earlier today that at the time of this accident, there was no visible difference between your right and left legs, is that true? A. What do you mean, sir?

Q. Well, with reference to your artificial foot, in other words, you said the casual observer wouldn't notice any difference between your right and left ankle. A. I said that

I wore under-hose on each leg in order to make both legs look alike or something as near alike, anyway.

Q. On the date of this accident, the appearance of your left leg was as though there was some bandage on it, isn't that true? A. No, sir. It is the under-hose I wear. There was no bandage. On this one (indicating), they might have seen a bandage.

Q. On the left one? A. Yes, sir.

Q. What I am trying to get at is, was there any distinction? When they looked at it, did they see the bandage on both ankles? A. No, sir, because I did not have any bandage on it. I didn't have any reason to.

Q. You had the type of hose that appeared to be a bandage? A. Yes, sir.

73 Q. And you had those on both legs? A. Yes, sir, that is right.

Q. After this accident, you say the bus driver pulled on down in this block outside the window here between 5th and 4th? A. Before he stopped to take our names, yes.

Q. You say he made a momentary pause as if to stop. Where was it then? A. Just right out there beyond 5th Street after he started up again.

Q. Are you familiar with where the Court of Appeals Building is, that is, the building on the southeast corner of the intersection of 5th and E? A. It was just about in there that he made this abrupt and violent stop, and that occurred at the intersection almost at 5th Street. Half of the bus stuck back out in 5th Street, and then in just a few seconds he started on and he acted as if he were going to pull over to the curb and stop. Then he pulled on down to 4th and E Street, and stopped at the W. M. & A. bus stop.

Q. He didn't make any stop before he got to the Juvenile Court Building? A. Before he got to the bus stop down here, he did not.

Q. Then what happened after he came to that stop? A.

74 He got out and got some pads of paper out and asked the ones that were injured to sign it.

Q. Was he courteous about that? A. Well, yes; I guess in his tone of voice he was.

Q. I mean he was pleasant to you and the other passengers, was he not? A. He didn't say anything to me.

Q. There was no unpleasantness towards you from him, was there? A. No.

Q. On the contrary, you upbraided him about the accident? A. No, sir, I was not. He had his duty to do. He was the driver.

Q. Didn't you upbraid the driver there when he did come to a stop because of your injury? A. I was crying and begging him to get me aid or get me a policeman. That is all the upbraiding I did.

Q. You weren't unpleasant at all in your attitude toward him? A. No, sir, I was not.

Q. The driver refused to let you get off? A. I didn't ask to get off.

Q. Didn't you ask to go to the hospital? A. I asked to be sent to the hospital. I asked him to get a policeman and send me to the hospital.

75 Q. What was his response to that? A. He didn't pay any attention to me.

Q. He ignored your request? A. Yes, sir.

Q. Did any of the fellow passengers protest at that treatment? A. No, sir.

Q. Did anybody else claim any injury from this accident, so far as you know? A. There were several of them claiming they were hurt but, after it was over with, why, they didn't seem to be hurt. I don't know why.

Q. You gave the impression this morning that he picked and chose the persons whose names he took. A. Yes, I think he did, sir.

Q. Did you intend to do that? Did you intend to convey that thought? Didn't he just hand out slips and ask the people for their names? A. There are a lot of people, you see, who won't take slips on buses, you know.

Q. Answer my question. Didn't he just go around and pass out slips to any and everybody who would take them?

A. He asked them to take them.

Q. Those that would, took them and signed them
76 and handed them back? A. Yes, sir.

Q. He had no way of forcing them to sign that paper, did he, or get their names? A. No, sir, he didn't.

* * * * *
77 Q. When did you say that Dr. Schwartze first came to give you medical attention? A. That same night sir.

Q. Are you sure of that, Mrs. Maske? A. Yes, sir, I am.

Q. I suggest to you that the doctor didn't see you until July 18, which was nine days after this accident. Doesn't that refresh your recollection? A. No, sir. He was called that same night and he came to our house. He got there around 9:00 o'clock at night. It was dark and he said he had been at Suitland, Maryland, on an emergency call, because I not only called once but we called two or three times.

Q. Mrs. Maske, I don't want you to make a mistake about this: Isn't it a fact it was some ten days that had passed—

Mr. Bress: One moment, please.

The Witness: No, sir.

* * * * *
78 Q. You couldn't be mistaken about the first time you saw the doctor for treatment of this ankle? A. No, sir, I could not, and he also saw me the next day.

Q. That would have been the—if the accident, you say, was on the 9th— A. Yes, sir, the next day was the 10th.

Q. The 10th, on what day did he have you X-rayed? A. I couldn't just state the date.

Q. Was it within two or three days after the accident? A. No; it was several days because he kept me in bed with my foot propped up.

Q. What do you mean by "several days"? Could it have been as much as a week? A. It wasn't a week, but it was almost a week.

Q. Where did you have the X-rays taken when they
79 were taken; the first X-rays? A. As far as X-rays, I had them taken at Providence Hospital.

Q. That was your first set of X-rays? A. Well, I had some kind of a machine, some kind of a light or something at Dr. Schwartz's office, and I took that to be an X-ray.

Q. The X-rays at Providence Hospital, are they the ones that you were talking about that were taken approximately a week or less than a week after the accident? A. No, I am not.

Q. When were the ones taken at Providence? A. They were about the latter part of the month.

Q. When did you go to Dr. Schwartz's office? A. I was taken in an ambulance by the Bladensburg Fire Squad. It was approximately a week after the accident.

Q. And during that week, Dr. Schwartz had been to see you only twice? A. No, sir, I couldn't say how many times. He was there several times.

Q. More than twice? A. Yes, sir.

Q. Did you have two sets of X-rays taken at Providence Hospital? A. Yes, sir.

* * * * *

80 Q. There was no cast on your foot at the time of the first X-ray? A. No, sir. When I was at Dr. Schwartz's office, he took some kind of a machine, a fluorol—I don't know what you call it, the medical term, and then he put a cast on it.

* * * * *

81 Q. Can you tell us, Mrs. Maske, what the first day of your return to work was after the accident? A. I returned sometime in August, the latter part of August. I couldn't just tell you what day.

Q. It was early in August, wasn't it? A. Well, I was called back on duty, as I stated before. I don't know just

what day, but I was called back on duty to give some instructions to my employees.

Q. Could it have been the 5th? A. It could have been, yes, sir.

Q. What was the date of your last treatment from Dr. Schwartz? A. I couldn't say that. It was shortly some time before he died.

Q. He was ill for a month or more before he died? A. Yes, sir.

Q. He didn't treat you during that period? A. No, sir.

82 Q. You were without a doctor then? A. It was about the first part of October, if I remember right, or the latter part of September.

Q. And the next doctor that gave you any treatment was who, Dr. Frohman? A. Yes, sir.

Q. When did he begin to treat you? A. Around the latter part of November or the first part of December, in 1947.

* * * * *

83 By Mr. Roberson:

Q. Mrs. Maske, do you recall receiving a medical report form for Dr. Schwartz to fill out about your accident and sending it in to the defendant? Do you remember getting that form? A. I remember writing out a form for Dr. Schwartz.

Q. Dr. Schwartz filled it out himself, and then you sent it in, the medical form, I am speaking of, isn't that correct? A. No, sir.

Q. I show you a piece of paper here marked "Medical Report." Wasn't that paper sent to you and you had Dr. Schwartz sign it and then you sent it to us, or to your lawyer? A. No, sir, Dr. Schwartz must have sent that in himself.

Q. You have seen that before, haven't you? A. No, sir, I never.

Q. Look up there where it says "Occupation"—"Supervisor." Isn't that your handwriting? A. No, sir, it is not.

Q. It is not your handwriting? A. No, sir.

Mr. Roberson: I want this marked for identification as Defendant's Exhibit 2.

84 (The medical report was marked Defendant's Exhibit No. 2, for identification.)

By Mr. Roberson:

Q. This is Dr. Schwartz's signature on here, isn't it?

A. I couldn't swear to Dr. Schwartz's signature.

Q. You are not familiar with it? A. I am familiar with it, yes, but I couldn't swear to it.

* * * * *

87 Q. Mrs. Maske, you have seen Dr. Schwartz's signature, haven't you? A. Yes, sir.

Q. Doesn't this signature on Defendant's Exhibit No. 2 for Identification look like his signature to you? A. You know, sir, I am under oath. I would hate to say.

* * * * *

88 Q. I have several times asked you and I want to know if, in your opinion, that looks like Dr. Schwartz's signature?

* * * * *

The Witness: No, sir, I don't know.

By Mr. Roberson:

Q. I didn't ask you if you knew. What is your opinion?

A. You want my opinion?

Q. As to whether that "E. W. Schwartz" signature is his signature. A. It doesn't look like it.

Q. It does or does not? A. It does not, sir.

* * * * *

89 Q. I don't believe that is responsive to my question. I want to know if it isn't a fact that you had lost many days from your attendance at the Veterans Ad-

ministration between January, 1947, and July 9 when this accident occurred. That is a fact, isn't it? A. I had lost several days.

Q. Wasn't it as many as 30? A. Well, it could have been because we are allowed 26 days of annual leave a year.

Q. And it is your habit to take all of your annual leave and all of your sick leave? A. Yes, sir, I have to, sometimes.

Q. After the accident, you also missed a great deal of time I believe you testified. That is true? A. Yes, sir.

Q. It is a fact, isn't it, Mrs. Maske, that you have lost more Mondays and Fridays than any other days? A. Yes, sir, I have. You want to know the reason?

Q. You have answered. Thank you very much.

Mr. Bress: Let her explain her answer, please.

By Mr. Roberson:

Q. Some of the time that you have lost since the
90 accident, of course, you have been taking care of
your husband. That is true, isn't it? A. No, sir. I
have had to use so much time for myself that I—he is being
taken care of by the Parole Officer from Perry Point, Mary-
land. I don't have to take care of him.

Q. You have answered, thank you.

Mrs. Maske, I want to ask you again with reference to Mr. J. P. White. A. Yes, sir.

Q. Representing the defendant. Isn't it a fact, Mrs. Maske, that on July 17 he came out to see you and at that time you stated that the bus stopped suddenly due to the fact that a coupe cut out in front of the bus and the bus stopped suddenly to keep from hitting the coupe? A. I didn't see Mr. White. I don't know any Mr. White.

Q. Did you make the statement as I have just read you? A. No, sir, I did not.

Q. Mrs. Maske, you had had arthritis in this right foot sometime prior to July 8, 1947, hadn't you? A. No, sir.

Q. You never had any arthritis in that foot, that right foot? A. No, sir.

* * * * *

91 Redirect Examination

By Mr. Bress:

Q. Mrs. Maske, did you ever have any trouble with your right foot or ankle at any time prior to this accident?

A. No, sir, I didn't.

Q. Did you ever receive any medical treatment on account of your right foot or ankle any time prior to this accident? A. I might have sprained it sometime when I was a kid or something.

Q. You aren't aware of it? A. No, sir.

Q. Mr. Roberson said something about you having taken Mondays and Fridays off more than other days. I would like you to explain to the jury why that coincidence exists.

A. In the Government, work slacks up on Friday and does not get started good until Tuesday morning and I was advised by my chief if I had to take days at all to try to be on Tuesdays, Wednesdays and Thursdays and take Fridays and Mondays so I would have a long week-end off and rest. That is why I took Fridays and Mondays mostly.

Q. Tuesdays, Wednesdays and Thursdays, you tried to make it your business to be present? A. Yes, sir.

Q. And by working on that kind of a schedule, have you repeatedly gotten an excellent efficiency rating at the Veterans Administration? A. Yes, sir, I have.

* * * * *

96 By Mr. Bress:

Q. As the bus was proceeding in an easterly direction on E Street, I would like you to tell us, if you can, where the left side of the bus was with respect to the center line of E Street. A. It was right at the center of the white line.

* * * * *

By Mr. Roberson:

* * * * *

97 Q. Just one other thing: Were you ever injured in a railroad accident? A. Railroad accident?

Q. Yes. A. No, sir.

* * * * *

100 Q. Mrs. Maske, you were formerly married to Mr. A. C. Pearce, were you not? A. Yes, sir.

* * * * *

Q. And you were known by that name when you worked at the Maritime Commission from December 15, 1941, until September, 1942? A. Yes.

* * * * *

103 **I. Phillips Frohman** was called as a witness by the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bress:

Q. Your name is Dr. I. Phillips Frohman? A. That is right.

* * * * *

105 Do your records show when you first saw Mrs. Maske? A. Yes.

Q. I think we will get at it more accurately that way A. November 22, 1947.

Q. Who referred her to you, if you know? A. I believe a co-worker, a patient of mine who worked at the place where Mrs. Maske worked.

Q. Did you obtain the history that she had been previously treated by Dr. Schwartz? A. Yes.

Q. And what did your examination at that time reveal? A. At the time I saw Mrs. Maske, she showed a swelling of the ankle, the right ankle and the foot, with some tenderness to pressure and some crepitation; or better than

crepitation, a simple word would be clicking of the foot in motion. She also had a limp on that lower extremity; right.

* * * * *

107 A. Examination at this time—if I may read it—
examination at this time revealed an extreme swelling and tenderness of the right ankle and a slight limp when she walked.

Q. Did you check the history and X-rays to ascertain what fractures, if any, she had in that foot? A. We checked the X-ray report at Providence Hospital and the verbatim report is in my report sent to the attorney and at that time the X-ray of July 21, 1947, showed a well marked arthritic condition of the ankle and posterior tarsal joints with some ankylosis.

On July 22, three X-rays were taken. There was
108 definite destruction resulting from some infectious process in the ankle joint.

* * * * *

113 By Mr. Bress:

Q. Doctor, now I ask you, to make it short, do you concur in your own interpretation of the X-ray plates with the opinion of the X-ray specialist at Providence Hospital as you have read his interpretation? A. Yes.

* * * * *

118 **Edith O. Maske** resumed the witness stand and was examined and testified further as follows:

Mr. Roberson: Will you mark this paper for identification Defendant's Exhibit No. 3?

(Application for employment of the plaintiff was marked Defendant's Exhibit No. 3 for Identification.)

Recross-examination—Continued

By Mr. Roberson:

Q. Mrs. Maske, I show you an application for employment marked Defendant's Exhibit No. 3 for Identification and ask you if you recognize it? There are two pages.

* * * * *

119 Q. Will you answer the question? A. Yes, sir,
that is my handwriting.

* * * * *

120 A. Yes, sir, that is my handwriting.

Q. It consists of two pages and the whole thing is
in your handwriting? A. Yes, sir.

Mr. Roberson: For the purpose of the record, this is De-
fendant's Exhibit No. 3 for Identification, a part of the
official records of the Maritime Commission produced in re-
sponse to a subpoena duces tecum.

* * * * *

123 Mr. Bress: Subject to the production by the clerk
of the records at Providence Hospital, who is on her
way here now and subject to the production of testimony
concerning the physical condition of the plaintiff tomorrow
morning, the plaintiff rests.

Mr. Roberson: Gladys Page:

Thereupon **Gladys Page** was called as a witness by the
defendant and, being first duly sworn, was examined and
testified as follows:

Direct Examination

By Mr. Roberson:

124 Q. Your name is Mrs. Gladys Page? A. Yes.

* * * * *

Q. Calling your attention to July 9, 1947, were you a pas-
senger on a W. M. & A. bus going out in the direction
125 of the Southeast? A. Yes, sir.

* * * * *

126 Q. Mrs. Page, do you recall any stops for traffic
after you got on the bus; for traffic lights, that is?
A. I don't recall.

Q. Do you recall later on stepping on a lady's foot?
A. Yes, sir.

Q. Where did that take place on E Street? A. Well, it seemed to me it was soon after we got on; possibly the next block.

Q. And you got in the bus between 6th and 7th? A. That is right.

Q. Will you relate to us the circumstances of your stepping on this lady's foot; what happened? A. You mean the whole story?

Q. Yes. A. Well, my niece, who was eight years old at the time, was standing in front of me and, of course, she was not so tall as I was and she held the pole below me and I had hold of it above her. My sister was standing on the other side of me but just as the bus had gotten into full motion, why a taxi cut in from the right in front of the bus and the bus had to come to a sudden stop and threw all of us.

Q. And is that the time that you were thrown forward? A. That is the only time I swung forward.

Q. What happened after that, Mrs. Page? Did you have a conversation with this lady? A. All I said was that I was sorry; very sorry.

Q. What did the bus do at that time? A. As I recall Mrs. Maske—I didn't know that was her name at the time—the lady that I stepped on said she was hurt and the bus driver said that he would make a report of it and he asked us to write down the circumstances.

The driver pulled across the street though, I do recall, after he stopped for the light and pulled across the street and took our names and addresses and the details.

Q. Is your recollection clear that this accident happened in the middle of the block, that is, between intersections as distinguished from across the street? A. That is right.

Q. Mrs. Page, did you hear any request of Mrs. Maske to the bus driver to call the police or take her to the hospital? A. No. The only thing I heard was she said she was hurt.

* * * * *

128 Q. Do you recall whether or not the lady called out at the time you stepped on her foot or screamed or anything of that sort? A. I don't remember.

Q. Mrs. Page, how about the speed of the bus at the time immediately prior to coming to a sudden stop? Was it excessive or what was it? A. I would say it was normal for the time there. I don't believe he was speeding. I mean I don't think he was speeding and I don't think that he stopped. I think he was going his normal speed.

* * * * *

By Mr. Bress:

Q. Do you know what the normal speed is of that bus going on E Street at 4 o'clock in the afternoon? A. No; I have no idea. It is just what I presume.

Q. Do you drive a car? A. I have.

* * * * *

129 Q. When you got on the bus, as I understand it, the bus started up and continued in motion and got up to what you say was a normal speed and made no stops until this stop which caused you to be thrown. A. As I recall. I am not sure.

130 Q. Did the bus make any stops for lights or to pick up passengers between the time that you got on until the time of the accident? A. I don't think so. I am not sure but I don't think so.

Q. You said on your direct examination that you recall stepping on the lady's foot and it seemed to you that it was soon after you got on, possibly the next block. You are assuming that it was possibly the next block because not much time elapsed between the time you were on and the time that this accident occurred? A. That is correct.

Q. And in the position that you were in on the bus, you didn't observe what intersections were being crossed while it was in motion and prior to the impact? A. That is possible.

Q. Did you have any sensation of the bus crossing the street car tracks just before the sudden stop? A. No, sir.

Q. The stop of the bus was not a usual stop, was it? It was not a normal stop? A. No, sir.

Q. It was an abrupt, sudden, violent stop that threw you from your holding position forward sufficiently to
131 step on this lady's foot? A. That is correct.

Q. You said something about a taxicab, Mrs. Page, but you didn't tell us very much about it. Would you tell us where this taxicab was when you first saw it? A. When I first saw it, it was cutting directly in front of the bus from the right.

Q. And isn't it a fact that the bus was traveling on its proper right-hand side of the street but the left-hand side of the bus was just about at the center line of E Street? Do you know that or don't you? A. No; I don't believe I could state that.

Q. Do you know whether or not there was room between the right side of the bus for there to be one lane of moving traffic and one lane of parked car traffic? Do you know that? A. I believe so.

Q. And when you first saw this taxicab it was in front of the bus, was it not? A. Not completely. It was cutting over when I saw it.

Q. It was in motion. A. The taxicab?

Q. Yes. A. Yes, sir.

132 Q. And was going faster than the bus? A. It was going faster but the bus—I guess it would be going faster because it did cut out.

Q. What I want to ask you is how fast was that taxicab going? A. I have no idea.

Q. Did you see the taxicab slow down at all? A. No.

Q. So that the taxicab was passing the bus at a speed faster than the bus on the right of the bus? A. No, not exactly. The taxicab pulled directly in front of the bus.

Q. But at a faster speed than the bus? A. I couldn't say that because the bus had to stop,—

Q. But you—

Mr. Roberson: Let her finish her answer.

The Witness: If the taxi had been going at a faster speed the bus would not have had to stop and the bus absolutely had to stop.

By Mr. Bress:

Q. And the taxi, however, never did slow down or stop, did it? A. No.

Q. The taxi cut around in front of the bus and kept on going, is that correct? A. That is correct.

133 Q. And you didn't get any clear view of the taxicab at any time but you merely saw it out of the corner of your eye, isn't that correct? A. No. I had a view of it, I am sure of that, because it scared me.

Q. For how long a period of time did you have a view of it? A. I don't recollect but that I am sure what I am saying is true.

Q. I am not questioning that. We just want to find out what you saw, Mrs. Page. How far a distance did the bus proceed while the taxicab was in the act of either passing it or getting in front of it during which distance you observed the taxicab? A. It seemed to happen very suddenly.

Q. So that if it happened very suddenly, can you tell us anything more clearly about the speed of the taxicab in suddenly cutting out in front of the bus? A. No. All I recall is seeing this taxicab cut right in front of us.

Q. You didn't see the taxicab in the parked lane of cars? A. No; I did not.

Q. When the taxicab was in the parked lane of cars, if it was there, can you give us an estimate of the speed
134 the bus was going? A. No, sir.

Q. How far the bus was from that taxicab when the taxicab left the curb? A. I have no idea.

Q. What did this taxicab look like? A. I don't recall. I just remember it was a taxicab but I don't recall the color of it even.

Q. Did you have any impression that it was a taxicab that was yellow in color. A. I don't recall the color at all.

Q. What was there about it, then, that indicated to you that it was a taxicab? A. I think anyone would recognize a taxi.

Q. What was there about this one? Was it the unusual color of it? Was it the license plate? A. I don't recall any of those things. I just recall there was a taxi and that is all I do recall.

Q. What position were you standing holding onto the pole? A. I was standing facing the driver.

Q. Facing forward? A. That is correct.

Q. And the taxi was first observed by you when it was cutting in front of the bus so that part of the taxi
135 was still forward of the bus when you first saw the taxi? A. That is correct.

Q. Was there any traffic in front of the bus or the taxi? A. I don't recall.

Q. Would you try and think about that? Isn't it a fact that when the taxicab was completely in front of the bus that there was no traffic between the bus and the taxi and no traffic in front of the taxicab? A. I do know that there wasn't any between the taxi and the bus but I don't recall in front of the taxi.

Q. Was there anything that you observed that prompted or would warrant the taxicab to either slow down or stop; any traffic in front of it or pedestrian or anything? A. Not that I recall.

Q. Did you observe what kind of a driver there was of the cab or didn't you get a view of that? A. When you are thrown, you don't recall those things.

Q. Were you thrown pretty violently? A. Well, yes, I was.

Q. And when you were thrown, you had no control over stepping on this lady's foot? A. No, I did not.

Q. What happened to you in stepping on her foot would have happened to any of us if we had been standing
136 where you were? A. I am sure of that.

Q. Did the bus sound any horn or swerve in any way because of the taxi? A. It might have. I don't recall.

Q. You don't know that and you don't know whether the taxi started up from behind the bus passing it on the right in the lane between the bus and the parked lane of traffic or whether it started from the curb and went from its own lane into the second lane, into the line in which the bus was driving. A. The only thing I remember was seeing it cut directly in front of the bus.

Q. And as it cut in front, it got in front and the bus stopped and the taxi kept on going? A. Yes.

Q. The taxi never did stop? A. No; the taxi didn't stop.

Q. About what occurred afterwards when the bus came to a stop? Did you hear Mrs. Maske complain about her foot and start to cry? A. Yes, sir.

Q. And did she appear to be suffering pain? A. Well, I couldn't say. I know that she did say she was hurt.

137 Q. She said nothing about going to the hospital but when the bus stopped again, in order for the driver to pass out slips to get the names and addresses of people on the bus, did you stay there in Mrs. Maske's presence while she had any conversation with the bus driver? A. Not in my presence.

Q. Did you hear Mrs. Maske, while the bus was stopped and she was filling out the slip, asking the driver to get a policeman? A. No, sir.

Q. Did the bus driver use any particular method in passing out the slips to several of the passengers? Did he pass them out only to the people who appeared to be hurt or be thrown or did he pass them out to all the passengers? A. No; they weren't passed out to all the passengers.

Q. Did he ask you, for example, were you the lady who was thrown, hand you a slip and hand one to Mrs. Maske because she was hurt and handed one to others who were thrown? A. No. My sister was thrown and he didn't hand her a slip.

Q. He didn't give her a slip? A. No.

* * * * *

138-9 **Bertha Krieger** was called as a witness by the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bress:

Q. Will you state your full name, please? A. Bertha Krieger.

Q. Are you employed by Providence Hospital? A. I am.

Q. Did you appear here yesterday to produce, pursuant to a subpoena, the hospital records of Providence Hospital concerning Mrs. Edith Maske? A. I did.

* * * * *

141 A. Yes, I will. "The plates are destroyed. There is not storage room enough at Providence Hospital to keep all the plates so, after a certain length of time, they are destroyed," and the report is made on an indices they keep there and is typed off onto that slip I gave you.

Q. Is this the typed slip from the indices showing the reading from the X-ray plates? A. That is right.

Q. Is it possible for you to produce those X-ray plates now? A. It is not.

* * * * *

142 Q. Do you know of your personal knowledge or is there any record showing that these plates were destroyed and, if so, does it show when they were destroyed? A. No, I don't know.

* * * * *

144 **Mrs. J. G. Augusti** was called as a witness by the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Roberson:

Q. You are Mrs. J. G. Augusti? A. That is right.

* * * * *

145 Q. Calling your attention to July 9, 1947, were you a passenger on a W. M. & A. bus on E Street, Northwest? A. Yes, I was.

* * * * *

Q. Did you obtain a seat? A. I did. I was sitting up front.

Q. Do you recall whether it was on the same side the driver was on or on the opposite side? A. It was on the opposite side.

Q. Were you sitting on a lengthwise or cross-wise seat? A. Lengthwise.

Q. And did there come a time thereafter when a lady's foot was stepped on on that bus? A. Yes.

* * * * *

146 Q. And then where did the actual stepping occur?

A. Shortly after we left the 7th Street stop.

Q. Do you recall any stop for traffic lights prior to the accident to the lady? A. No; I don't. The only time that I recall stopping for any lights was when he had to stop to take the names of the passengers. That is the time I recall because he crossed 5th Street, the light here at 5th and stopped and took the names of the people that saw the accident.

Q. This accident then happened before your bus reached 5th Street? A. Yes.

Q. Can you locate it more closely for us with respect to any building near which it occurred? A. I don't remember too well. I mean I would have to say "I think." I couldn't say "I do." I mean I know it happened. I remember clearly it happened after we left the bus stop but just where it was I couldn't tell you. I don't know exactly where.

Q. You are certain it happened before you reached 5th Street, is that correct? A. Oh, yes.

Q. Did it happen in the middle of the block or did it happen close to the intersection? A. That I couldn't tell you definitely.

147 Q. Tell us what you do recall seeing, Mrs. Augusti.

A. Well, I do remember these two women boarding the bus at 7th and E with two small children and shortly after we left the bus stop, there was a sudden stop of the bus, sudden jerk.

I looked to see and it was a taxicab in front of the bus. Then I heard an outcry and this party that stepped on Mrs. Maske's foot was sort of—she had lost her balance and the bus driver then asked if anybody was hurt and she said, "Yes," she was and that is the time I learned that this woman who was standing with the little girl had stepped on her foot because she said—I didn't see her step on her foot but she made the remark that she had stepped on it.

Q. How about this taxi that you say you saw in front of the bus immediately after the stop? Was the taxi in motion or at a standstill when you saw it? A. I don't remember.

Q. Do you recall what lane of traffic the bus was proceeding in? A. No, I don't.

Q. Do you recall about its speed? A. No.

Q. Could you characterize it as fast or slow or otherwise?

A. You mean the bus?

148 Q. Yes. A. Well, it wasn't going very fast. It was going a moderate rate of speed. It wasn't going fast.

Q. Do you drive a car yourself? A. Yes, I do.

Q. You say after the sudden stop, the bus driver pulled across an intersection and then stopped and gave out witness slips? A. After the bus stopped short, why the cab went on—I mean he didn't stop. He kept going.

Q. And then the bus itself went on across 5th Street and came to another stop?

Mr. Bress: Please don't lead the witness.

The Witness: Well, when he turned around and asked if anybody was hurt, we were close to the light there at 5th Street and he said—I remember the bus driver saying—"Well, I am going to cross this light and stop over here

and take the names of the people that saw the accident," and he did cross 5th Street. I do remember him crossing and stopping right out here in front of the courthouse.

Q. You mean right back here (indicating)? A. On E Street between 4th and 5th. That is where he stopped and took the names of the different people.

* * * * *

149 Q. Can you recall the lady who had been injured demanding that the police be called? A. No; I don't remember her saying that she wanted any police called.

* * * * *

Q. Do you recall any request on the part of the plaintiff, Mrs. Maske, to the bus driver that she wanted to be sent to the hospital? A. No; I don't remember her saying she wanted to go to the hospital.

* * * * *

150 Cross-examination

By Mr. Bress:

Q. Did the bus driver at any time, in your presence, say anything to blame the taxicab for his having to stop? A. No. That is my own conception, that he had to stop short because, when he stopped short, I looked to see why he stopped short and I saw the cab there. That was my reason, my own reason; not the bus driver's.

Q. That is your own conclusion? A. That is it. That is my conclusion.

Mr. Bress: I move that the witness' conclusion be stricken. I am asking only for what she observed.

The Court: The conclusion will go out.

151 Mr. Roberson: She did see the taxicab.

The Court: Anything the witness testified as having seen herself may remain in the record.

By Mr. Bress:

Q. Mrs. Augusti, the first time you saw a taxicab was the taxicab directly in front of the bus? A. That is right.

Q. You saw a moving taxicab directly in front of the bus traveling in the same direction the bus was traveling and in the same lane of traffic with the bus? A. It would be in the same lane of traffic because it was in front of the bus.

Q. And when you say "in front of the bus," you mean directly in front of the bus? A. That is right.

* * * * *

152 Q. So, sitting in the position you were on the bus looking forward, the only taxi you saw was a taxi that was immediately in front of the bus? A. That is right.

Q. Not too far in front of the bus because you only saw that portion of the rear of the taxicab which extended from a little below the rear glass of the taxi to the top of the taxi? A. That is right.

* * * * *

153 Q. The taxicab that you referred to was how far in front of the bus when you first saw it? A. I couldn't tell you because I am not a good judge of distance.

* * * * *

154 A. No, I was sitting up front where there are three on one side and three on another and they face one another. Mrs. Maske and I were facing one another and there was a party on each side of us.

Q. You were, therefore, on the opposite side of the bus from Mrs. Maske? A. I was directly in front of her.

Q. Facing her? A. Facing her.

Q. In that position, were you looking forward or were you looking straight ahead toward Mrs. Maske? A. That I couldn't tell you where I was looking, to be honest with you, at the time.

Q. What was there that attracted your attention to looking forward and seeing this taxi? A. The sudden stop of the bus.

155 Q. And it was, therefore, not until after the stop that you looked forward and saw the taxi moving in

the direction— A. I looked forward to see why he stopped so short.

Q. And you saw a taxi in front of him? A. That is right.

Q. You can't tell us how far it was from the front of the bus to the rear of the taxicab at the time? A. No, I couldn't tell you.

Q. Can you tell us anything about the speed of the taxicab? A. No.

Q. Did the taxicab at any time stop? A. That I couldn't tell you.

* * * * *

Q. Was there anything between the front of the bus and the rear of the taxi that would obstruct the view of the bus driver or of you of the taxicab? A. No; I don't think so,—let me get this straight—you mean the bus and the cab, for instance, the cab is here and the bus is here (indicating) and you mean right in the middle?

Q. Yes; was there anything in between? A. No; I didn't see anything there.

Q. Did you observe the speed at which the taxicab was going as it continued? A. No, I didn't.

Q. Did you notice what color taxicab it was? A. Well, now I am going to say "I think" because I am not definitely sure. I thought it was a Diamond. It was a light colored cab.

Q. Light colored? A. I think it was a Diamond but I say "I think" because I am not sure.

Q. You know it was light colored? A. It was light colored, yes, cream colored.

Q. It wasn't a black cab? A. No.

Q. Were you in the position where you could hear all conversation Mrs. Maske had with the driver? A. Well, I was but there was such a commotion, you know, when it happened; I mean the excitement and everything, that I couldn't tell you anything.

Q. From all you heard, you heard nothing?

157 A. Except that she was hurt. I heard her say she was hurt and that her foot was stepped on.

Q. When the bus came to a stop and the cards were distributed on which the names were taken, isn't it a fact that the bus came to a stop approximately outside the windows where we are now and nearer the Juvenile Court where there is a bus stop for this bus at 4th and E? A. No; he didn't stop down that far. He passed this light out here at 5th and E and stopped about in the center of the block, the middle of the block.

Mr. Roberson: May the record show she is indicating the square between the Juvenile Court and the Court of Appeals?

158 The Court: The record will so indicate.

The Witness: I am sure he didn't get as far as the other bus stop down there, no.

* * * * *

Q. How long did he stop? A. Long enough to take the names and addresses of the people that saw or heard something in the accident.

Q. You are not here, however, to testify where it was where the bus came to a sudden stop? A. The accident?

Q. Yes. A. No; I don't give you a definite —
(The answer was not finished.)

* * * * *

159 **Mrs. Mary Calder** was called as a witness by the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Roberson:

Q. Your name is Mrs. Mary Calder? A. That is right.

* * * * *

Q. Calling your attention, Mrs. Calder, specifically to the afternoon of July 9, 1947, were you on a W. M. & A. bus en route to your home? A. I was.

* * * * *

Q. Where were you sitting? A. Either on the first or the second cross seat, the opposite side from the driver.

160 Q. And you were facing in the direction the bus was traveling? A. That is right.

Q. Did there come a time on your en route home when a lady had her foot stepped on by another lady on the bus? Did that occur? A. Well, I don't know that her foot was stepped on.

Q. But there came an incident in which a lady claimed to be injured, isn't that right? A. That is right.

Q. Where did that take place, Mrs. Calder? A. To the best of my memory, nearest the corner of 6th and E. I mean the bus had cleared the corner between 6th and 5th on E Street.

Q. It happened closer to 6th than to 5th, is that your testimony? A. Yes.

Q. Are you familiar with where Georgetown University Law School is? A. I am.

Q. That is a red brick building on the south side in that block? A. Yes, sir.

Q. The accident or whatever transpired, where did it take place with relation to Georgetown Law School, 161 if you recall, the entrance to Georgetown Law School?

A. Well, right before the entrance; I mean slightly before arriving at the entrance.

Q. Closer to 6th Street? A. That is right.

Q. Tell us what happened, Mrs. Calder, to your observation. A. Well, I was riding along; not particularly paying any specific attention to anything, probably day dreaming, and the bus came to a sudden stop and I heard an outcry. I looked up and I saw that the lady standing was in an awakened position as though she had been jolted, although I didn't actually see her being thrown, but just in an awkward position.

Then I looked up and saw that a car was stopped in front of the bus, causing the bus driver to stop suddenly.

Mr. Bress: I object to what caused the bus driver to stop. She can only tell what she saw.

The Court: The objection as to the conclusion is sustained.

By Mr. Roberson:

Q. At any rate, when you looked up you saw a car directly in front of the bus? A. That is right.

Q. And it was standing still at that time? A. That
162 is right.

Q. Mrs. Calder, did you notice anything about that car or about its painting that would indicate anything to you one way or another? A. You mean the color?

Q. Was it a commercial vehicle, truck, taxicab, or do you recall? A. I would say a taxi.

Q. Do you recall anything about the speed of the bus immediately prior to this sudden stop? A. A moderate rate of speed.

Q. Do you drive a car yourself? A. No, I don't.

Mr. Bress: I object to the testimony of the witness in characterizing the rate of speed as "moderate." It has not been shown she is qualified to estimate speed.

By Mr. Roberson:

Q. Have you ridden in automobiles? A. Yes, I have.

Q. Have you ridden in front seats of automobiles many times? A. Yes, I have.

Q. You have had occasion to look at the speedometer of cars as the automobiles went along? A. Yes.

163 Mr. Roberson: I submit now the witness is qualified to express an opinion on moderate speed.

The Court: The answer may stand.

Mr. Bress: I object to the answer, if the Court pleases, on the ground that merely looking at speedometers does not help us in determining what the witness means by the word "moderate."

The Court: You may cross-examine the witness on that.

Mr. Bress: Very well.

By Mr. Roberson:

Q. Mrs. Calder, after the sudden stop, what did the bus operator do then? A. I really don't remember clearly at the time.

Q. Do you remember giving your name to the bus operator? A. I do.

Q. Do you recall whether that was at the spot or a little further on down the street? A. I don't recall.

* * * * *

164 Q. Were you within earshot of the lady who was injured? A. Yes.

Q. Approximately, in feet, how far were you from her? A. I would rather not say because I am not a good judge of distance.

* * * * *

Q. Did you hear the lady who was injured request of the driver that he call the police? A. No.

Q. Do you recall her making any request that she be sent to a hospital? A. I don't remember, no.

Q. I couldn't hear you. A. I do not remember.

* * * * *

By Mr. Bress:

Q. You didn't hear the lady ask for the police or hospital nor did you hear all the conversation that she had,
165 did you? A. I don't recall, no.

* * * * *

Q. Mrs. Calder, did you hear any of the conversation between the bus driver and the plaintiff? A. If I did, I don't remember now. I would say no—well, if I did hear I just don't remember.

Q. Therefore, if there was any request made by Mrs. Maske of the driver or any other conversation between them, you either didn't hear or don't remember it? A. Correct.

Q. Is that correct? A. That is correct.

Q. Have you any confusion in your mind as to where this sudden stop occurred; whether it was between
166 6th and 5th or 5th and 4th? A. Yes.

Q. You have had some doubt about it in your own mind, haven't you? A. That is right.

* * * * *

Q. Do you know how far from where the sudden stop occurred, where the lady was hurt, how far it was to the place where the slips were given out? You can't answer that either? A. No.

Q. From the time that the bus made its stop at 7th Street and picked up passengers, did it make any further stops between that time and the time of the sudden stop where this lady was hurt? A. I can't clearly recall.

Q. You were sitting on this bus at the end of the day. Had you worked that day? A. I had.

Q. And the term you used, you said you were
167 "day dreaming." You weren't paying any particular attention to where the bus was at the moment when the stop occurred, nor were you paying any particular attention to speed, is that correct? A. Correct.

Q. And in view of that restful position in which you were in, you don't remember anything about the distance that the bus was from 6th Street or 5th Street at the time the sudden stop occurred? A. The only thing I clearly remember, I have said that it was 6th and then you asked me was I clear whether it was 6th or 5th—the only thing I clearly remember was that it had passed the intersection of whatever street it stopped, whether it was closer to the corner of 6th or closer to the corner of 5th.

Q. You don't know. You know that it had crossed the intersection? A. That is right.

Q. Before it came to a stop and you don't know which one of the intersections it was? A. That is correct.

Q. With respect to the speed of the bus at the time, were you paying any particular attention to the speed of that bus at the time it came to the stop? A. Well, I have said

a moderate rate. I think if it were speeding—

168 Q, It would have attracted your attention? A. Yes.

Q. Do you travel on buses frequently? A. Twice a day for the past five years.

Q. And you have had experience on buses traveling 30 to 35 miles an hour?

Mr. Roberson: I object, Your Honor.

Mr. Bress: I am testing the meaning of the word "moderate."

Mr. Roberson: Let's test it with 10 or 15.

The Court: She may answer the question.

By Mr. Bress:

Q. Have you been on any bus that has ever traveled 30 to 35 miles an hour? A. Have I ever been on any?

Q. Yes. A. May I state what bus?

Q. Yes. A. I think Greyhound buses, yes.

Q. That is out on the open road? A. That is right.

Q. Have you ever been on a bus in the city of Washington, Connecticut Avenue, E Street, any boulevard in which the bus was going 30 to 35? A. I don't know. As I
169 have said before, I am not a good judge of speed.

Q. I am just trying to find out precisely what you mean by the word "moderate." I want to find out whether your conception of the word "moderate" is that whenever you are riding on a bus within the city limits in busy areas that the buses always go at moderate speeds or slow speeds? A. Well, 15 to 18 miles.

Q. You have never had the experience of being on a bus, driving on E Street or Connecticut Avenue or Massachusetts Avenue that the bus ever went any more than that, is that correct? A. That is right.

* * * * *

By Mr. Roberson:

Q. Mrs. Calder, whatever the intersection was, the bus had crossed before it came to a sudden stop, it had en-

tirely crossed it? A. Yes, that is what I mean, that it had entirely cleared.

Q. Whatever intersection it was? A. Whatever intersection.

* * * * *

170 **LeRoy Halverson** was called as a witness by the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Roberson:

Q. Will you state your full name, please? A. LeRoy Halverson.

* * * * *

171 Q. Referring to those records, Mr. Halverson, is there an employee's injury report made out by Mrs. Maske with respect to a fall in a rest room? A. Yes.

Q. At the Veterans Administration? A. Yes.

Q. Will you refer to that in the record, sir? A. I have it right here.

Q. What was the date of this fall in the rest room, Mr. Halverson? A. On April 12, 1946.

* * * * *

By Mr. Bress:

Q. This incident is reported as a fall due to wax collecting on the heel of a shoe, is that correct? Did you read this? A. Yes.

Q. Do you have any other record of a fall sustained after July, 1947? Have you looked this over to see if there is ones? A. I don't believe there is another one after that date.

* * * * *

172 Q. Will you look and see if there is another one and, while you are looking, will you see if there is any incident of an injury sustained as a result of a fall of

an electric fan which this lady claims to have sustained?
A. There is one as a result of an injury from an electric fan.

Q. What was the date of that incident? A. June 6, 1949.

Q. This reads, "Incidents of falls or mishaps to employees of the Veterans Administration" and which do not result in injury or medical treatment would not find their way into this file, is that correct? A. I believe that is true.

* * * * *
179 **Theodore Thomas Weyandt** was called as a witness by the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Roberson:

Q. Will you state your full name, please? A. Theodore Thomas Weyandt.

Q. Where are you employed, Mr. Weyandt? A. Finance, Veterans Administration.

Q. In response to a subpoena duces tecum, have you brought with you today the Veterans Administration leave record with respect to Mrs. Edith O. Maske from the first of 1947 on? A. Yes, sir.

198 **Jack P. White**, called as a witness in behalf of the defendant, being first duly sworn on oath according to law, was examined and testified as follows:

199 Direct Examination

By Mr. Roberson:

Q. Your name is Mr. J. P. White? A. Jack P. White.

Q. What is your residence address, Mr. White? A. 119 Franklin Avenue, Lewes, Delaware.

Q. What is your occupation, sir? A. Attorney at law.

Q. Where were you residing in July of 1947? A. 4504 South Capitol, Washington, D. C.

Q. Were you then employed in Washington as an investigator? A. Yes.

Q. Mr. White, in the course of your duties as an investigator, do you recall investigating an alleged injury to Mrs. Edith O. Maske, the plaintiff in this case? A. I do.

Q. Will you tell us what you did in that connection in July of 1947? A. To the best of my recollection, I had a conversation with Mrs. Maske regarding an alleged injury.

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By Mr. Roberson:

Q. The question was the date of the conversation.

A. The date: July 17, 1947.

Q. Was that a personal interview? A. That was.

Q. Where did it take place? A. That was at the home of Mrs. Maske. I don't recall the exact address.

Q. At that time did you write out a statement based on the facts she gave you? A. I did.

Q. Did you show it to her? A. I did.

Q. Did she read it over? A. Yes, she did.

Q. Did she sign it? A. She did.

Q. I show you a document marked "Defendant's Exhibit No. 1 for identification" and ask you if you recognize it, sir. A. I do.

Q. What is it, sir? A. It is a statement in my handwriting which I took of Edith Opal Maske, dated July 17, 1947. Do you want the whole statement read?

Q. No; don't read the whole statement. That is
201 the one you showed her and she signed in that interview? A. That is correct.

Mr. Roberson: I now offer this in evidence as defendant's exhibit D.

* * * * *

202 Q. Mr. White, after you had written this piece of paper and Mrs. Maske had signed it, did she then tell you some further details about the accident that do not appear in that piece of paper? A. She did.

Q. What did she say?

* * * * *

203 Q. This was at the original interview, wasn't it, Mr. White? A. Yes.

Q. What further remarks did she make that do not appear in the exhibit which you have? A. May I refresh my memory?

Q. Yes. A. She stated that the bus stopped suddenly due to the fact that a coupe had cut in front of the bus, and the bus stopped suddenly to avoid a collision with the coupe.

Q. Subsequent to that interview, Mr. White, did you send the plaintiff a medical-report form to be filled out by her doctor? A. I did.

Q. On what date did you do that, sir? A. That was on July 23, 1947.

* * * * *

204 Mr. Roberson: I offer in evidence defendant's exhibit D, the letter, your Honor.

The Court: It will be received.

(The covering letter, Defendant's Exhibit B, was received in evidence.)

* * * * *

The Court: Admitted.

(The covering letter, Defendant's Exhibit B, was received in evidence.)

* * * * *

205 Q. Mr. White, will you read your letter of July 23, 1947, to the jury? A. This letter is addressed to:

"Mrs. Edith O. Maske,
6060 Brook Road,
Capitol Heights, Maryland.

"Dear Mrs. Maske:

"Pursuant to our conversation, I am enclosing medical report to be completed by your doctor. Please have your doctor complete the same and return to this office in the enclosed self-addressed envelope.

"Very truly yours."

Q. Signed by whom? A. J. P. White.

Q. That is a carbon copy from which you just read?

A. That is correct.

Q. I show you a piece of paper marked Defendant's Exhibit 2 for identification and ask if you recognize that?

A. I do.

Q. What is that, Mr. White? A. This is a medical report of Edith Maske, 6060 Brook Road, signed by E. W. Schwartz, 1225 Calvert, Southeast.

Q. Is that the medical report form that you sent her to have completed? A. That is true.

* * * * *

Cross Examination

* * * * *

206 On your direct examination, Mr. White,—and I will keep these papers separately—you said you are now engaged in the practice of law. Were you a lawyer in July of 1947, when you investigated this case? A. I was.

Q. I think you stated that you were employed as an investigator in Washington at that time. A. That is correct.

Q. And did you investigate this case? And by investigation I mean do what you say you did, in communicating with Mrs. Maske and obtaining this statement, and also sending her the medical report, on behalf of the interests of your employer? A. That is correct.

Q. Who was your employer, on whose behalf you made that investigation at that time? Don't answer the question until the Court has ruled.

Mr. Roberson: May we approach the bench?

The Court: You may.

(Thereupon, counsel approached the bench and the following proceedings were had out of the hearing of the jury:)

Mr. Roberson: Your Honor, the witness at the time was employed by the Travelers Insurance Company. I submit there is no necessity for bringing that up. He has testified he was an investigator and he investigated on behalf of the defendant, which is the Travelers Insurance Company. I think it would be prejudicial error to go into the insurance status.

Mr. Bress: Ordinarily, we are very careful to avoid any mention of insurance. However, a decision of the Court of Appeals holds that where an employee of an insurance company testifies as to any matters done by him in the scope of his employment, the fact that he was employed by the company may be shown on cross examination, so that the jury can use its own judgment in evaluating his testimony, from the point of view of interest.

208 The fact that this man is now practicing law, as against being employed by Travelers at this moment, is of no consequence. He did certain work, and he has the same interest to uphold what he did at that time, so that, under the decision of the Court of Appeals, I submit I have the right, for what it is worth, for the jury to know on whose behalf he was making the investigation.

The Court: It is clear there is no issue on the point that he was examining this woman or conducting this investigation in behalf of the defendant, in behalf of the concern who is defending this action, and the Court sees no point, in view of the ruling with respect to exclusion of evidence of insurance, generally speaking, when we all know there are subtle ways that have been employed to inject insurance into the case, and I am not suggesting you are animated by any such motive as that.

The Court is of the opinion that, in view of the fact that the witness is manifestly representing the defendant in this action in taking this statement and is making no other con-

tention than the fact that he was employed by the company which may have been carrying the risk, it would add nothing to the record in this case so far as the issues were concerned.

Mr. Bress: I say, your Honor, that he was not investigating on behalf of the defendant; he was investigating on behalf of his employer, the insurance company, pursuant to its obligations under an insurance policy.

The Court: He was investigating on behalf of the defense of the action, for the purpose of asserting the defense, regardless of whether he was doing it on behalf of the insurance carrier or the actual defendant, and the Court is of the opinion that the question is improper and will sustain the objection.

* * * * *

210 Q. Was it not your practice that if you wanted a medical report form to be filled out by a doctor, you would request your secretary to send the medical report form to the claimant? A. That is correct.

Q. And you personally would not get into that detail of work of your office? A. Some cases, yes; in some cases, no.

Q. In this particular case, one of these memoranda that you showed me seems to bear the initials "JPW"; I take it that that is you. A. That is correct; that is right.

Q. Dated July 21, 1947. A. That is right.

Q. And then, on July 23, '47, two days later, dated 7-23-47, VR. That is "VR", your secretary? A. That is right.

Q. And "VR", who was your secretary, who initialed this memorandum, is the same "VR" who typed the letter of transmittal; is that correct? A. That is correct.

Q. And is it a fact that, in this memorandum, you sent this to your secretary and gave her this instruction, 211 "Send claimant medical report blank"? Were these instructions? A. That is correct.

Q. And doesn't your secretary, when in receipt of a memorandum like this from you, prepare a forwarding letter of instructions, attaching a blank to it, and send it out? You don't get in on that at all, do you? A. That is correct.

Q. The request that is made is that the medical report form be delivered by the claimant to her doctor so that he could fill it in and return it to your office; is that correct?

A. That is correct.

Q. The reason why you do that is because you might not know who the doctor is, and you would have difficulty in obtaining a medical report from the doctor direct, and the only way you could get it is through the patient of the doctor? A. That is correct.

Q. So that it is the practice to request the patient of the doctor, the claimant, as far as you are concerned, to submit this blank report to the doctor, to get him to fill it out, and send it to you? A. That is right.

Q. And this report of July 29, which you have identified, is the report form which Dr. Schwartze has sent in? A. That is correct.

Mr. Roberson: What is the date of that, Mr. Bress, 212 that you just referred to?

Mr. Bress: Defendant's Exhibit 2, dated July 29.

By Mr. Bress:

Q. How long prior to July 1947 had you been engaged in the business of investigating claims for damages for personal injuries? A. Since 1941.

Q. And during that period, were you a member of the bar, or had you gone to law school during that period?

A. I was a member of the bar at that time.

Q. Prior to 1941? A. That is right.

Q. And you remained in that occupation, that is, of investigating, until how long after July of 1947? A. In 1943 I went to the United States Navy and I was separated September 26, 1946.

In November of 1946 I went back to my job as an investigator.

Q. And you continued in that job through July of '47 and until when? A. Until September of '47.

Q. And it was then that you left that employment? A. That is correct.

Q. And you shortly thereafter began to practice law?

A. One year thereafter.

213 Q. With your experience, sir, having gone through law school, and your experience over the number of years which you have indicated as an investigator of claims, you knew pretty well when you went to see Mrs. Maske, as you say, on July 17, you knew pretty well what the nature of her claim was and what the important elements of it were that you wanted to get in that statement, did you not? A. That is correct.

Q. And if you knew that—If you knew that, Mr. White, why is it that you needed refreshment of your memory about things that she told you orally that were important about how this accident occurred but which do not appear in this written statement at all? A. After she had made the statement, she then, after she had signed the statement, she then had other conversation which she made to me and which did not appear as a part of the statement.

Q. Mr. White, you testified on direct examination that the lady was injured because someone stepped on her because the bus stopped suddenly to avoid a collision with a coupe. You were interested in finding out what occurred, and the important thing that you wanted to find out was what caused this lady's injury; isn't that right? A. That is correct.

Q. Did you, in talking with her and in preparing
214 this statement, as you say you did, did you put anything in here about the fact that the bus stopped suddenly to avoid a collision? A. I don't recall; I would have to see the statement again.

Q. I will let you look at it.

* * * * *

Q. I asked you: Did you not, as an experienced investigator, at this time, feel that it was your duty, when you went to her home to get a statement, to get a complete statement as to what she knew as to the cause of her injury? A. We never know what a complete statement is.

Q. Do you mean that during the entire time that you talked with her that nothing was said by her about a sudden stop of the bus? A. After she signed the statement, she made that statement.

Q. You mean you got part of the statement in writing and then the material part you did not get in writing? You got that orally? A. It is according to what you mean by "Material."

Q. I mean the part that deals with what caused her injuries. You got everything in here except that, what caused the women to step on her, and you say that, following the signing, she told you that, but you did not write that down, did you? A. Well, the direct cause of the injury was the girl stepping on her foot, and what the other causes were I didn't know at that time.

Q. You didn't know at that time? A. No, I did not know.

Q. Didn't you know that she told you that the bus stopped suddenly? A. She told me after the statement was signed, yes.

Q. Do you mean that when this statement was written out by you, you did not know that the bus had come to a sudden stop and that made the lady step on her? A. She didn't tell me that.

Q. You mean she didn't tell you that until you finished writing the statement? A. That is correct.

Q. But as soon as she signed it, you then found it out?

A. That is correct.

216 Q. But you didn't ask her to sign a statement covering that? A. No, sir; because that statement already was prepared.

Q. You knew, did you not, that if a passenger on a bus stepped on her foot as a result of the passenger's own conduct and not as a result of a sudden stop, that your employer would not be liable, did you not? A. Well, I don't know about that. Her complaint was that a passenger was standing, and that was her entire argument.

Q. And you shortly thereafter began to practice law?

A. One year thereafter.

213 Q. With your experience, sir, having gone through law school, and your experience over the number of years which you have indicated as an investigator of claims, you knew pretty well when you went to see Mrs. Maske, as you say, on July 17, you knew pretty well what the nature of her claim was and what the important elements of it were that you wanted to get in that statement, did you not? A. That is correct.

Q. And if you knew that—If you knew that, Mr. White, why is it that you needed refreshment of your memory about things that she told you orally that were important about how this accident occurred but which do not appear in this written statement at all? A. After she had made the statement, she then, after she had signed the statement, she then had other conversation which she made to me and which did not appear as a part of the statement.

Q. Mr. White, you testified on direct examination that the lady was injured because someone stepped on her because the bus stopped suddenly to avoid a collision with a coupe. You were interested in finding out what occurred, and the important thing that you wanted to find out was what caused this lady's injury; isn't that right? A. That is correct.

Q. Did you, in talking with her and in preparing
214 this statement, as you say you did, did you put anything in here about the fact that the bus stopped suddenly to avoid a collision? A. I don't recall; I would have to see the statement again.

Q. I will let you look at it.

* * * * *

Q. I asked you: Did you not, as an experienced investigator, at this time, feel that it was your duty, when you went to her home to get a statement, to get a complete statement as to what she knew as to the cause of her injury? A. We never know what a complete statement is.

Q. Do you mean that during the entire time that you talked with her that nothing was said by her about a sudden stop of the bus? A. After she signed the statement, she made that statement.

Q. You mean you got part of the statement in
215 writing and then the material part you did not get in writing? You got that orally? A. It is according to what you mean by "Material."

Q. I mean the part that deals with what caused her injuries. You got everything in here except that, what caused the women to step on her, and you say that, following the signing, she told you that, but you did not write that down, did you? A. Well, the direct cause of the injury was the girl stepping on her foot, and what the other causes were I didn't know at that time.

Q. You didn't know at that time? A. No, I did not know.

Q. Didn't you know that she told you that the bus stopped suddenly? A. She told me after the statement was signed, yes.

Q. Do you mean that when this statement was written out by you, you did not know that the bus had come to a sudden stop and that made the lady step on her? A. She didn't tell me that.

Q. You mean she didn't tell you that until you finished writing the statement? A. That is correct.

Q. But as soon as she signed it, you then found it out?

A. That is correct.

216 Q. But you didn't ask her to sign a statement covering that? A. No, sir; because that statement already was prepared.

Q. You knew, did you not, that if a passenger on a bus stepped on her foot as a result of the passenger's own conduct and not as a result of a sudden stop, that your employer would not be liable, did you not? A. Well, I don't know about that. Her complaint was that a passenger was standing, and that was her entire argument.

Q. What do you mean, "You don't know about that"? You are a lawyer. If a passenger—

Mr. Roberson: Your Honor, I submit that counsel is not to argue with the witness.

Mr. Bress: I submit that this is proper cross examination.

The Court: I think the examination is proper.

By Mr. Bress:

Q. You mean, as a lawyer, that you do not know that if this lady was sitting on the bus and that if a passenger carelessly stepped on the lady's foot, that the bus company would not be liable for that? You know that, don't you?
A. Yes, I know that to be true.

Q. You knew that in July of 1947? A. I did.

Q. And what you got in this report, this written
217 statement, only has to deal with that, that a passenger stepped on the lady's foot, and that is all; is that correct? A. No; that is not correct. She said a lady swung around and stepped on her foot.

Q. Is there anything in that statement that indicates what, if anything, caused the lady to swing around and step on her foot? A. No.

Q. Did you not know at the time you interviewed this lady and when you prepared this statement that the lady that stepped on her was thrown as the result of a sudden stopping of the bus? A. The only thing at that particular time I knew was that this woman—

Q. Will you please answer my question, sir?

Mr. Roberson: Let the witness respond, sir.

Mr. Bress: He can answer that question yes or no.

The Court: The witness may answer the question in his own way.

The Witness: At that particular time, I did not know what had caused this woman to swing around and step on the claimant's foot. If I had have known, I would have put it in this statement.

By Mr. Bress:

Q. You are sure you did not know? A. To the
218 best of my knowledge, no.

Q. Didn't you know that there were names of other witnesses on the bus at the time and didn't you have a statement from the bus driver himself, before you went to see this lady, in which he admitted that there was an abrupt stop? A. I don't recall it. I don't recall.

Q. You knew that there was a claim of an abrupt stop that caused the lady to step on her, on July 17. You knew that but you didn't learn it until just after she signed that statement; is that correct? A. As far as I know, I didn't know it at that particular time, or it would have appeared in this statement.

Q. When you testified, on direct examination, that, after writing the statement, she told you any further details, that is, the question asked of you by defense counsel, and you pulled out papers, and you said, "I will have to refresh my memory," and you said, "Yes, she told me the bus stopped suddenly and a coupe cut across in front of the bus and the bus stopped so as not to cause a collision," you learned that after she signed this statement? A. That is correct.

Q. Did you have another piece of paper available with you, or was that the only piece? A. No, I had other pieces.

Q. Did you think that it had any relevancy to the
219 incident that you were investigating, to have the lady sign a statement concerning the direct cause of this collision, as you claim now she had said it at the time? A. Her injuries were so nominal I did not consider it important.

Q. I didn't ask you about her injuries. A. You asked me the reason why.

Q. Yes. You didn't think her claim was sufficiently serious enough to get a true statement of what she told you; is that correct? A. No; I didn't consider it.

Q. That is the reason why you didn't reduce to writing and have her sign a statement concerning this sudden stop of the bus? A. That is correct.

Q. And that is the best explanation you have for why that is omitted from the statement? A. That is right. I made a memorandum of it.

* * * * *

220 Q. Do you deny that you had a telephone conversation with Mrs. Maske in which you discussed this occurrence and that you then prepared a statement in your own handwriting; that you never met her, and you mailed it to her to sign, and that this is the statement that you mailed, and that it contained only the matters that you selected to put in? Do you deny that? A. I do.

Q. Mr. White, just a few more questions.

When you went out, as you say, to see Mrs. Maske, did you know anything about the nature of the incident in which she was injured? A. I don't recall how much I knew, no.

Q. Ordinarily, would you not have, before you go out, a report from your own client as to what the incident was about and as to what his contentions were concerning it? A. It all depends on the circumstances; sometimes the client is totally ignorant of what the claim is.

Q. But in a case where the client is a bus company, which has an operator, is it not customary to have a statement from the operator before you begin an investigation? A. Not necessarily, no.

221 Q. If the bus operator had given a statement promptly to the company, you would have had that before you investigated, more than a week after this accident, would you not? A. It all depends how prompt the operator and the bus company were.

Q. Could you refresh your recollection, at my request, and see, by looking at the file, that your office then had, whether or not there was in that file prior to July 17 a

statement from the driver of the bus? A. I might be able to do so.

Q. Have you been able to find a bus driver's statement in there? A. You mean a signed statement?

Q. No. I didn't ask you about a signed statement. Do you have anything in that file from the bus driver which was in there before July 17? A. I have a statement, whether it is from the bus driver I do not know.

Q. From Coleman? A. I have a statement here,—It doesn't show any signature—whether it is oral or written—from Alan B. Coleman, yes.

Q. Alan B. Coleman. Is not that statement dated 222 the very day of the accident, July 9? A. No, it is not.

Q. What is the date on it? A. It is July 10, 1947.

Q. Is July 10 the stamp mark when it was received at your office or is that the date entered in writing as showing the day it was signed? A. July 10 is the date the person who mailed out this statement used.

Q. Is there a stamp mark, a time clock mark, on that, showing the date it was received by your office? A. July 13, 1947.

Q. What was in that file that bears any date earlier than July 13?

Mr. Roberson: If it please the Court, may we approach the bench on this?

The Court: You may.

(Thereupon, counsel approached the bench and the following proceedings were had out of the hearing of the jury:)

Mr. Roberson: Your Honor, I don't know what the answer will be with respect to what was in the file, but the file he is examining, your Honor, is that of the Travelers Insurance Company, and I don't want to inadvertently have any remark about insurance papers or the
223 first notice of the insurance claim or anything like that to come out.

Mr. Bress: I am very careful. I will still steer clear of that.

The Court: Very well.

* * * * *

Q. I want to know what papers were in that file prior to July 17.

I will modify my question. Are there not in that file some reports of the names of witnesses that are dated prior to July 17? A. There are.

Q. Does this statement from the motorman, which is in that file, and which is dated July 10 but is stamped dated July 13, was it, or July 12? A. July 13.

Q. Does not that statement admit that there was a sudden stop, an abrupt stop? A. Yes, it does.

Q. You knew that before you went to see this lady on the 17th of July; is that right? A. I presume so.

Q. Did you know that, from your reports in your 224 file that were in there prior to July 17? A. I don't see anything at the particular time.

Q. You knew, then, when you went there on July 17, that your own client, shall we call him, had admitted that there was an abrupt stop that resulted in the lady getting injured by having some other lady passenger step on her, but you still say that you didn't discuss that with Mrs. Maske, until after she had signed this rather innocuous statement. A. That is correct.

Q. And you still deny that this was the paper that was sent to her by mail? A. Absolutely, I deny it.

Mr. Bress: May I have this marked Plaintiff's Exhibit No. 6, instructions to his secretary?

(The memorandum referred to was thereupon marked for identification as Plaintiff's Exhibit No. 6.)

By Mr. Bress:

Q. Is it not your usual practice to witness the signature of a claimant to a signed statement? A. In some cases I did and in some cases I did not.

Q. Is it your practice to witness the signature, when you are personally present, but not to do it when you receive it by mail? A. I never received them by mail.

Q. You never sent a statement to a witness, to be
225 signed, by mail, after talking to them on the telephone? A. Not when I was an outside man, no.

Q. Did you see any other witnesses in this case prior to July 17? A. I don't know. I don't see anything in here that would indicate that I did.

Q. When was the first time that you did take a statement from any other witness in this case? A. I don't know if I took one or not. As I say, I don't know. I don't see it in here.

Q. You don't know whether or not you took statements from anybody except Mrs. Maske? A. That is correct.

Q. Wouldn't your file show whether you had any other statement from any other witness? A. If it was still in here, it would.

Q. When the names of any witnesses were submitted to you, wasn't it your job to go out and interview them and get signed statements from them? A. That is correct.

Q. Did you do your job? A. I may not have finished the case.

Q. Did you get anybody's name on a piece of paper as a witness other than Mrs. Maske? A. As I say, I don't know until I examine the file.

226 Q. Please do so. A. Apparently not.

* * * * *

Q. Do you have any recollection about any witness in this case other than Mrs. Maske? A. Not at the present time, no.

Q. You don't remember ever talking to any lady witnesses or men witnesses? A. I don't recall, no.

Q. Were you the only one in charge of the investigation of this case in your office? A. I left the company in August 1947, so, I don't know how many worked on it since then.

Q. Prior to your leaving and until you left, did you have charge of this case? A. As far as I know.

Q. You, therefore, do not know whether any witness was seen, other than Mrs. Maske, from the time this occurred in July until you left in August of 1947? A. Not of my own personal knowledge, no.

Mr. Bress: Do you gentlemen have on file statements of witnesses?

* * * * *

227 Mr. Bress: Do you gentlemen have any objection to my examining those files?

Mr. Roberson: I have no objection to producing the original statements if your Honor would admit them in evidence.

Mr. Bress: My request was: Do you have any objection to my examining those statements?

Mr. Roberson: None whatsoever.

By Mr. Bress:

Q. Who is "JRB"? A. That is J. Reid Bradley.

Q. A fellow employee. I show you here a statement purporting to be a copy of a statement dated December 26, 1947, signed by Mrs. Josephine G. Augusti, and ask you whether or not it appears on that statement that
228 her signature was witnessed by a fellow associate of yours, working with you in your office. A. I would say so, yes.

Q. Would the same rule apply, the same policy apply, with respect to obtaining witnesses' signatures made in your presence, apply to all the men in your office? A. It did.

Q. I show you next the statement you have in your file dated March 19, 1947—which is an incorrect date: March 19; the accident had not yet occurred—signed Mary N. Calder, a lady who testified here today, and I ask you whether or not this purports to be a copy of a statement, and if it is witnessed by one of your associates.

Mr. Roberson: Just a moment, Mr. Bress. Isn't that '48?

Mr. Bress: No. It is incorrectly dated. This numeral is 1947.

The Witness: Yes; March 19, 1947.

By Mr. Bress:

Q. That is what it says here? A. That is what it says here.

Q. And here, dated March 25, 1948, also purporting to be a copy signed by John P. Dodge—he was a fellow associate of yours; wasn't he? A. That is correct.

229 Q. And this purports to cover his conversation with Mrs. Gladys Page, who testified here, the lady who stepped on the foot, and Mr. Dodge signed this and Mrs. Page did not; is that correct? A. It does not appear that her name is there.

Q. It doesn't have her signature. As a matter of fact, it does appear that her signature was not available, does it not? A. Apparently so, yes.

Mr. Bress: I think that covers them all. Thank you, sir.

Mr. Roberson: No further questions.

May this witness be finally excused, sir?

* * * * *

232 Mr. Roberson: If your Honor please, yesterday, during the course of Mr. White's examination, your Honor reserved ruling on the admissibility of defendant's exhibit No. 1 for identification, which is a paper the plaintiff admitted signing but said she signed the paper in blank. Mr. White said she did read it and that she signed it.

We offer it in evidence at this time.

Mr. Bress: No objection.

The Court: Admitted.

(The document heretofore marked as Defendant's Exhibit C for identification was thereupon received in evidence.)

* * * * *

Mr. Roberson (reading): "July 17, 1947.

"My name is Edith Opal Maske; married, and I am 39 years old. I am employed with the Veterans Administration as a supervisor, Munitions Building, 19th & Constitution Avenue, Northwest.

"On July 9, 1947, at 4:07 p.m., I was a seated passenger on a side seat near the front of a W. M. & A. bus.

233 A passenger who was standing in back of me swung forward and as she stepped back she stepped on my ankle, right, in two places.

"The girl was hanging onto something prior to the accident, so she said, and she said after the accident she would hang on tighter next time.

"A woman sitting on the side seat next to me had her glasses knocked off by this girl. The girl sitting next to me was Martha Clayborne, Dupont Heights, Maryland.

"I went to Dr. Schwartz and he took some X-rays and he doesn't know whether it is broken or not.

"I have read the foregoing statement and the facts are true.

(Signed) "Edith Opal Maske."

* * * * *

234 **Mrs. E. W. Schwartz**, called as a witness in behalf of the defendant, being first duly sworn, was examined and testified as follows:

* * * * *

236 Q. You are Mrs. E. W. Schwartz? A. Yes.

237 Q. You are the widow of Dr. E. W. Schwartz? A. Yes.

Q. When did Dr. Schwartz die? A. He died in November 1947.

Q. Do you recall the particular day? A. It was Armistice Day that he died.

* * * * *

Q. And in July of '47 he was keeping records with reference to his patients? A. Yes; but he had not transferred the records at the time of his death, all of them.

238 Q. His original book of entry, you call the day book? A. No. He had three different books which he used, and he was just getting ready to transfer them. The night before he died, I mean before he took his heart attack, the house was so filled with patients that the living room, the library, and even the stair steps going up, were filled. He stayed from 6 until 2 and then went to the hospital. Now, I have no record of any of those patients —

* * * * *

Q. In response to my question: Is it a fact that Dr. Schwartz kept his records in his own handwriting — A. He did.

Q. At my request, have you brought with you the doctor's day-book recordings? A. I have brought at your request the unfinished records of Dr. Schwartz. It so happens that when the doctor died, it just seems to be a coincidence that when he was in the hospital this woman patient wrote him a letter that her case was to be settled, and wanted a bill. That is the only case on the doctor's records that is clear. I wanted to put that in.

* * * * *

240 Q. Mrs. Schwartz, will you please refer to the day-book, the records of the doctor, and tell us whether the doctor saw Mrs. Maske as a patient, according to the records, on July 8? A. You call this a day-book; this isn't the only day-book.

* * * * *

241 Q. Mrs. Schwartz, for what purpose was the day-book used, the book I refer to? A. This (indicat-

242 ing)? Q. Yes. A. Mostly the people will pay the doctor money and he is so afraid of his income tax he always puts down what they give him, and the day-book is used for advance calls, as a reminder, more —

* * * * *

Q. He frequently has entries on there when payments are not made. In other words, he enters the visits. A. Advance visits mostly, in this book, to remind him for next week, or two weeks. There are names in this for a week or two weeks after he died.

Q. Tell me this, Mrs. Schwartz: What entry do you have on there for July 8, 1947, and where does it show the visit was made? A. It was in the hospital. It was not this case.

Q. Will you refer to the record, Mrs. Schwartz?

* * * * *
243 A. I am sorry. Yes. "See Maske at the hospital."

Q. On July 9, 1947, the next day, is there any entry with respect — A. Not in this book, but I have an entry on that.

Q. Is there any entry — A. Not in this book.

Q. Will you let me — A. Do you want me to look for you?

Q. No. Let me finish my question. Is there any entry with respect to a payment for the visit of July 8, 1947? A. Not in this book.

* * * * *
Q. Is there any entry on that record with respect to payment of that hospital visit? A. No.

Q. Is there any entry of a visit to Mrs. Maske on July 9? A. Not in this book.

Q. Is there any entry with respect to July 10, 1947? A. Not in this book, but I will look, to be sure.

244 Q. How about July 11, 1947? Is there any entry of a visit? A. Not in this book, but I will look.

Mr. Bress: If the Court please, the lady has already said that this book covers advance appointments. There is no testimony that advance appointments were made by Mrs. Maske with Dr. Schwartz. Therefore, I think that taking one day at a time and asking if there are advance appointments is trying to create a question of impeachment which does not exist.

The Court: If the book covers only advance appointments, the objection would seem to be good, unless counsel is intending to show —

Mr. Roberson: I think it has evidentiary value.

Moreover, I believe it is a fact that this book of appointments is the book on which the doctor predicated his charges, that is, he would enter a visit, and then, later on, if someone paid him, he would come back and put the charge in. Whether or not it was paid in advance does not make any difference in this case.

Mr. Bress: It is not a question of payment in advance. The lady has said that this is the book that Dr. Schwartz used to make advance appointments.

There is no claim that advance appointments were made here. I have no objection to this entire book going into evidence and letting the jury see it, but what I do
245 object to is the characterization, in leading questions, to imply some impeachment where none exists.

Mr. Roberson: The impeachment will come later, Mr. Bress.

Mr. Bress: That is a completely voluntary statement, and you have nothing to back that up, either.

The Court: The Court will permit the answer to be made.

By Mr. Roberson:

Q. Mrs. Schwartz, in order to save time, is there any entry in the day-book of any visit or appointment of Dr. Schwartz and Mrs. Maske, according to your record, between July 8 and July 17, including July 17? A. Only by telephone. I answered the telephone.

* * * * *

246 Q. Begin with July 9 and go through July 17 and see if there is any entry with respect to Mrs. Maske's visits or appointments. A. Nothing on July 9. Nothing on July 10, in this book. Nothing on July 12, in this book. Nothing on July 13 and 14, in this book; 15 or 16.

Mrs. Maske has an office call on July 18, which you saw; you have it there.

Q. One call at the office. A. Office call, and it is a charge, in this book.

Q. Mrs. Schwartz, will you continue on through August 4 and see if there are any similar entries between
247 July 18, about which you testified, — A. I want to add, on July 18, the doctor has marked it in pen and ink, and later, going over it, he has put the charge in pencil. Here he has "Maske, 6 p.m."

Q. What is the date of that? A. On July 19.

Q. Is there one for the 20th or any time between then and August 4? A. He has got here a call for him to phone Maske. This is reminders, you see, for him to phone Maske, on July 21.

Q. That is in your handwriting, isn't it? A. No; it is in Doctor's handwriting. Everything in here is in Doctor's handwriting.

Q. Very well. That is the 21st, notations? A. Yes; he wants to call her. He is reminding himself, as a reminder, to call him.

Q. Yes. A. On July 22 he is reminding himself to see Edith Maske for a new case.

Q. Will you show me that entry? A. Yes. You missed that one when you came out, didn't you?

Q. That is the 22d. I had asked you to carry it on through August 4 and tell me about any entries that appear in
248 the day-book between those dates or on any of those dates. A. He has again to remind him to phone Maske on Friday, July 25. Then he has down here, later, to "See Maske," a reminder.

* * * * *

Q. I ask you to go through August 4. A. I am on July 29th now.

July 29, he says, "See Maske to go to a house call and take the cast off." I don't know what that is. It is "to go" — "cast off" — something; that is his handwriting. Did you miss that one, too?

Q. Can you read what the word is, Mrs. Schwartz? A. It says, "See Maske," and then "cast off", and then something —

Q. "Off Sunday"; is that what it says? A. It must be. Yes. This is "off." This must be "off Sunday." He is reminding himself something about a fall. Did she have a fall?

* * * * *

A. On July 31, he has "See Maske." One call. I
249 don't know what this is he has here; something in a charge. He says, "See Maske," and then, afterwards, he made a call and some kind of a charge.

Q. If you can help us translate — A. You see, he has written this, and then, later on, there is a difference; slant of the pen. He has made one call to the home and charge, that is what that is.

Mr. Bress: I think that is very clear. "One call, home." It looks like handwriting on the doctor's prescription.

By Mr. Roberson:

Q. That is on July 31, "home call." How about the first of August? A. He has here, "Maske cast off" and he scratched it out. He must have undoubtedly been unable to take the cast off there.

Q. What date was that, Mrs. Schwartz? A. On August 1.

Q. Does that indicate a visit? A. No; that indicates that he had reminded himself to go take her cast off and undoubtedly he had a baby that day or something, and he scratched it off.

He has on August 2, "Maske; one dress". That means he dressed her wound and charged it.

Q. Now, the third. A. On the 4th he has—Nothing on the 3d but on the 4th he has, "See Maske", and, later, he made one house call.

250 Q. Mrs. Schwartz, you recall my coming out to see you,— A. Yes.

Q. —this past Tuesday, and asking you to show me your records with respect to Dr. Schwartz's treatments of Mrs. Maske. A. Yes.

Q. And you did show me that day-book, among others? A. Yes.

Q. Have you got any other records that show an entry in the doctor's handwriting of a visit between the dates of July 9 and July 17? A. No. You remember what I told you. Shall I tell what you told me then, as long as you asked me what I said?

Q. I am just asking if you have got any other records that show a visit? A. On August 4. Not in Doctor's handwriting, but I can't find that little book.

Q. You have some other book? A. The book where he takes the phone calls from me, I told you I had torn up.

Q. You did tell me that you had a roomful of records; that you could not go through them. A. And you summonsed me before you came out, and I was trying to get heads or tails, and I had a hard time getting this.

251 Q. You are doing the best for us. A. The next morning. I only had from late afternoon to the next morning to even get this for you.

Q. So you haven't any records that would demonstrate any visit or appointment during that period? A. Not with me.

Q. You don't know anywhere else? A. I know but the Judge says not to tell anything except what you ask me.

Q. Do you have any records in the doctor's handwriting to show any visits? A. Not with me.

Q. I asked you to bring any record that you have with respect to him, didn't I? A. Yes.

Q. Mrs. Schwartz, to change the subject a bit, you are familiar with your husband's handwriting, aren't you? A. Yes, I am.

Q. I show you a paper marked "Defendant's Exhibit No. 2 for identification", called a "Medical Report", and ask you if that is the ink writing in the doctor's handwriting.

A. It looks very much like it. You showed me this yesterday, you know, and I told you yesterday that it certainly looks like my husband's signature down here.

Q. I mean all the handwriting in ink is your husband's? A. Yes. I would say it looks like my husband's writing.

Q. Directing your attention specifically to the word "superior" on the second line of this document, is that in your husband's handwriting or is that— A. The "clerk" is in Doctor's handwriting.

Q. Somebody— A. "Supervisor", there.

Q. It is in a different handwriting? A. Somebody other than the doctor.

Q. Mrs. Schwartz, do you have any other written records with respect to Mrs. Maske, any records written by him? A. Yes, I do. I have the record—he was so concerned in the record that he dictated to his son, who is now a doctor. He wanted to clear the record so he could answer her letter, and I have the notes about that.

Q. You mean that is something that he gave to his son and his son later on sent to Mrs. Maske? A. Am I allowed to tell this—take time for this?

* * * * *

253 The Witness: Yes! it is a record of the treatment of the plaintiff. You saw it already. We discussed it.

You see, you just want to see this (indicating). You know, you read this, and then you read this (indicating), and then you read this, and I told you that my boy wrote that, and, in getting in touch with my lawyer,—

Mr. Bress: I submit that this colloquy between witness and counsel is not proper.

* * * * *

255 Did Mrs. Maske receive treatment from Dr. Schwartz between July 9 and July 17? A. She did.

Q. To what extent did she receive such treatment, if

you know? A. Well, the records which I just read, you can tell by the casts and all and calls came in to me.

* * * * *

256 Q. Mrs. Schwartz, the book which you have produced and about which you have been asked questions, beginning with the date July 9 to August 4, does that book show all visits made by Dr. Schwartz during that period with Mrs. Maske? A. It does not.

Q. Is there any other book that you have that would show all those visits during that period? A. There is.

Q. Do you have that book? A. No; and it would take me a week to find it, and I had too little time to get it.

* * * * *

258 The Court: You now desire to make her your own witness?

Mr. Bress: Yes.

The Court: You may do so.

By Mr. Bress:

Q. I will ask you now the question, Mrs. Schwartz: Do you know of your own personal knowledge that Mrs. Maske was under the care of Dr. Schwartz between July 9 and July 17?

* * * * *

259 The Witness: I know it to be a fact that she was.

* * * * *

Q. Did you work with him in his office as his clerk or nurse? A. He never left the phone without leaving it to me. All the patients transacted their business on the phone with me. I couldn't work with him as his nurse very much because I had to cook and keep house for him.

* * * * *

260 Q. Can you tell us, if you know, how many times between July 9 and July 17 he saw Mrs. Maske, either at her home or at his office? A. I can't tell you the exact date but he saw her many times.

Q. Do you recall whether or not on July 9 your husband was out on a call at Suitland in Maryland—Don't answer this if there is an objection—and upon his return at night did he or did he not make any entry which you observed with respect to having seen Mrs. Maske that night before returning to his home? A. I don't know that.

* * * * *

Mr. Roberson: Your Honor, at this time I wish to introduce in evidence an application for employment which has been identified as defendant's No. 3 for identification, and the plaintiff has said it is all in her handwriting.

* * * * *

262 Mr. Bress: If Your Honor please, this document was selected from the whole file of Civil Service documents. There are many other documents in that file in the same handwriting.

I would have no objection to the use of those but the substance of this is what they would like to get in.

The Court: What is it?

263 Mr. Bress: Here is one thing I noticed and the only thing I have noticed so far: This lady, in 1929 when she was in that gas stove explosion, had a number of her toes blown off in that explosion. She testified that she was quite crippled in that foot as the result of that.

There was nothing in that testimony to show she wore any prosthesis as a result of that. In filling out this application, there appears, back in 1941, that she wears an artificial limb but walks well. She didn't wear an artificial limb. She had these toes blown off and she had a little jigger of some kind that extended to the front of the foot with a strap that went up to her ankle on the foot that was later amputated and that feature, they might argue; why she wore an artificial limb back in 1941 and she tells you now she didn't wear one until 1945.

It can be explained away but why get into possible impeachment when there are other documents in the same handwriting?

The Court: Of course, the Court cannot select the documents. If it is essential to proper identification or comparison of the signature that the entire handwriting of an instrument should be used, then I think the instrument is admissible. The Court cannot select the document in order to form the basis for comparison.

Mr. Bress: There are dozens of other instruments
264 in the same file that we would have no objection to.

The Court: Can't the signature of the witness be sufficiently identified——

Mr. Roberson: I don't think that is adequate, Your Honor, for a handwriting expert. In other words, he should be able to run through a whole complete document and compare various letters. How often it appears, and all, is material.

I don't think Mr. Bress is giving any reason for keeping it out on the ground that, if it is in, it will affect the credibility of his client.

Mr. Bress: Pages 2 and 3 have a lot of handwriting on them. Why doesn't he use pages 2 and 3? Why does he want that front page?

The Court: That includes the signature.

Mr. Roberson: Her signature was different. Her name was "Pierce" at that time.

Mr. Bress: The handwriting is adequate on pages 2, 3 and 4. All you have to do is fold the document. I am not being selective. I think defense counsel is selective. He wants the jury to read it and it is not admissible.

The Court: I think the suggestion that you use pages 2 and 3 is a wise suggestion. I see no point in injecting anything in this if it is not put on for the purpose of impeachment.

Mr. Roberson: I think it is likewise admissible for
265 impeachment purposes.

Mr. Bress: You have not used it for that purpose.

Mr. Roberson: I don't think I am restricted to that. I can only take one thing at a time.

Mr. Bress: It wouldn't be admitted for impeachment purposes because the lady will admit to that.

Mr. Roberson: She didn't on the stand.

The Court: If it is contrary to something else testified, it can be used for impeachment. I have to take the record for what it is.

Mr. Bress: I don't know what else is in counsel's mind except his intent on getting this document in the record when there are hundreds of documents in this lady's handwriting closer than 1941.

The Court: You may make your record. The Court will admit the document.

(Thereupon, counsel resumed their place at the counsel table and the following proceedings were had in the hearing of the jury.)

Mr. Roberson: May the paper previously marked Defendant's Exhibit D for Identification be marked Defendant's Exhibit D in evidence?

The Court: It may.

(The document above referred to was thereupon marked Defendant's Exhibit D and received in evidence.)

* * * * *

266 **Ira N. Gullickson** was called as a witness on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Roberson:

Q. Will you state your name, Mr. Gullickson? A. Ira N. Gullickson.

Q. What is your occupation, Mr. Gullickson? A. I am an Examiner of Questioned Documents.

Q. Where are you employed, sir? A. Metropolitan Police Headquarters.

Q. How long have you been so employed, sir? A. About 20 years.

Q. During that time, you specialized in examining questioned documents? A. That is correct.

Q. What special training have you had with respect to examining questioned documents, Mr. Gullickson? A. I took up the study in 1927. At that time, there were no schools that carried on any instruction. I instructed myself until in 1930, I attended the first school of criminology at Northwestern University and, while there, I had
267 the opportunity to study under two nationally recognized authorities, Herbert J. Walters and J. For-
dyce Woods.

Upon my return to the District, I became associated with Dr. Ferrar, the Dean of Document Examiners in this country, who was connected with the United States Treasury Department.

Since then, I have practiced and been associated with him up until the time of his death.

Q. Is an examiner of questioned documents what is commonly known, in lay language, as a handwriting expert? A. Well, it is referred to as that but an examiner of documents goes much further than the mere examination of handwriting.

Q. An examiner of questioned documents goes further than that. What do you mean by that? A. Well, it includes the examination of typewriting, paper, inks, erasures, alterations and so forth.

Q. And for the past 20 years, you have done that type of work for the Police Department in Washington? A. That is right.

Q. For what other agencies have you acted as an expert on questioned documents? A. Well, I have been called in, I believe, by all of the old line agencies of the Federal Government, that is, the Veterans Bureau, the Treasury Department, State Department, Department of
268 Justice.

Q. Have you testified with respect to questioned documents in this, the United States District Court for the District of Columbia? A. Yes, I have qualified and testified in all of the courts of the District of Columbia.

Q. Approximately how many times a year do you appear in this court?

* * * * *

The Witness: In these courts in the District, I would say between 20 and 25 times a year.

By Mr. Roberson:

Q. Have you appeared in courts of the states as distinguished from District Courts? A. Yes; I have appeared in all of the surrounding states.

Q. Have you been retained in connection with questioned documents by the well-known law firm of Newmyer & Bress?

Mr. Bress: I object to the question. I think that is an unfair question.

The Court: The objection is sustained.

You have gone into his qualifications.

* * * * *

275 Q. Mr. Gullickson, going back to Defendant's Exhibit No. D, have you made a study of that document at my request? A. Yes, I have.

Q. I now show you the questioned document marked Defendant's Exhibit No. 2 for Identification and ask you if you have likewise studied that at my request? A. I have.

Q. Directing your attention specifically to the word "supervisor" which appears on the second line of Defendant's Exhibit No. 2, have you compared that with the writing on Defendant's Exhibit D, the admitted document? A. Yes; I have.

Q. And have you formed an opinion, Mr. Gullickson, based upon your experience in the field of questioned documents as to the authorship of the word "super-
276 visor" on the questioned document A. I have.

Q. What is your opinion?

Mr. Bress: I object, if the Court pleases. I think it is pretty common knowledge that you cannot form such an opinion on one word and I object to it unless there is an adequate showing to the contrary by this witness.

The Court: Overruled.

By Mr. Roberson:

Q. What is your opinion as to the authorship? A. It is my opinion that the word "supervisor" appearing in the third line of Exhibit No. 2 was written by the writer who filled in Exhibit D.

Mr. Roberson: I offer in evidence Defendant's Exhibit No. 2 for Identification, Your Honor.

Mr. Bress: Objected to.

* * * * *

(Thereupon, counsel approached the bench and proceedings were had out of the hearing of the jury.)

Mr. Bress: May I state my objection, if the Court please? The Court: You may.

Mr. Bress: My objection is on the ground that counsel is making a calculated effort to get before the jury
277 a document which is concededly the statement of the physician and he is trying to show that because one word that this fellow identifies, "supervisor"—I don't know where it is—the one word "supervisor", that one little word appears to be the same handwriting as this (indicating) in order to get before the jury incompetent evidence.

Even if this is the same writing, Your Honor, this is not admissible in evidence because he cannot show and there has been no showing that the word "supervisor" was added after the document was filled in. He is trying to draw an inference because if one word is in the lady's handwriting, therefore, she must have seen this document filled in. That does not follow.

The document is complete hearsay and is not admissible and the attempt to get it in by that inference is inappropriate and prejudicial.

Mr. Roberson: Does Your Honor wish to hear me on this?

The Court: I will be glad to hear you.

Mr. Roberson: Your Honor, this is the document which Mr. White testified he sent to Mrs. Maske with a covering letter directing her to have Dr. Schwartz fill it out and then to return it to the defendant.

The doctor evidently filled it out in his own handwriting because his widow has testified that everything in
278 ink, with the exception of the word "supervisor" appears in the doctor's handwriting.

You will observe that the word "clerk" has been marked out and "supervisor" added underneath it.

The evidence now is that the "supervisor" was written by the plaintiff in this action. Therefore, after the doctor had filled out this statement of the lady, the lady went through it and made the only change which she wished made in that document before it was sent back to the defendant.

I submit that it is now admissible in evidence because it has been traced to her, through her doctor and back to her with a change and if it contains anything that is contrary to what she has gotten in here through an alleged stipulation at pretrial, I certainly think it is competent evidence as a declaration against interest and there are features in that document which are contrary to what she has testified.

Mr. Bress: Of course, there is prejudicial statement here. The doctor has a notation of the date he first saw the lady, July 18. It has got a statement about how the accident occurred. It has a lot of things that are prejudicial.

Mr. Roberson: It is a statement she gave him and she evidently went through this, marked out one word and wrote in the word "supervisor".

The Court: I will admit the document in evidence.

* * * * *

279 Mr. Roberson: I ask that Defendant's Exhibit No. 2 for identification be marked Defendant's Exhibit E.

The Court: It will be admitted.

(The document heretofore marked Defendant's Exhibit No. 2 for identification was thereupon marked Defendant's Exhibit E and received in evidence.)

* * * * *

280 Q. I said when. You were requested on Wednesday night. When did you first see any document that was shown to you today? A. Yesterday morning.

Q. Was that in the corridor of the courthouse?
281 A. That is right.

Q. What document was shown to you? A. The document was identified as the questioned document and the documents that were identified as standard were shown to me.

Q. What documents were shown to you beside the two documents here? A. There was another document, a long handwritten document.

* * * * *

282 Q. Can you make a comparison on the basis of signature only? A. Well, that depends. It can be done. That is regularly done on a signature only.

Q. If you have only one word as a base in a questioned document, can you, by comparing that word with the signature, determine whether or not they are both of the same handwriting? A. It is problematical. It would depend entirely upon the word and the letters, the sequence of letters appearing in the signature.

283 Q. I show you the questioned document. The word that you have here in one word, "supervisor"; is that correct? A. That is right.

Q. And did you compare this word "supervisor" with the body of this statement yesterday? A. No; I compared it with the signature, Edith O. Maske.

Q. Did you find them to be the same or different? A. I found them to be the same but not based on these documents alone.

Q. What other documents did you use? A. The Exhibit No. —

Q. This document (indicating)? A. "D", that is right.

Q. That is the only other one you saw? A. That is right.

* * * * *

285 Q. Do people's handwriting change over a period of years? A. Yes, it does.

Q. And if you have a word allegedly written in 1947 in a comparison of handwritings, wouldn't you prefer to have the document written in 1947 as the basis for comparison? Wouldn't that be better than a document in 1941? A. It might be better. It depends entirely upon the writer of the document. Many writers, over a period of many years during their middle span of life, there is very little change in their writing. We will find very little variation over a period of 15 or 20 years.

Q. Worry; nervousness; shock; pain; anguish; those things, if they continue for years, do affect a person's handwriting, do they not? A. That depends entirely upon the individual. Some individuals, worry and shock will violently affect it. Others——

Q. It will not? A. Will show very little effect.

Q. Were you shown any other documents as the basis for comparison dated in 1947? A. No; the document that I have is the one.

Q. This is the only one that was shown? A. Yes.

286 Q. And using documents written in 1947 would be a better basis for comparison, would they not? A. Well, it would merely add to what I have there.

Q. Will you tell this jury on what it is that you formed your opinion that the one word "supervisor" is in the same handwriting as the document, Defendant's Exhibit D? State the facts and only the facts upon which that

opinion is based. A. The first examination of the standard writing shows a very fine quality of writing.

Q. You mean the pen is a sharp pen? A. No; a very fine quality. It is a good writer. The pen is very sharp. It is the stenographic type of pen with a very fine point but the writing is very clear, very legible, very smooth and I could term it as "pretty writing".

It is a right-hand slant and it agrees with what is commonly known as the Palmer system or Palmer method of writing. That same condition is consistently found in the writing of the word "supervisor".

The word "supervisor" compares, in line quality, with the shape of the letters, the manner of writing, the pen pressure, the size and the slant.

Then referring to each of the letters we find in the word "supervisor", we find those letters consistently appearing in document D; the style of writing, the capital "S". The

"u", of course, does not have much character in it.

287 Q. Take the letter "S". What did you compare the letter "S" with? A. With the "S" that appears on Defendant's Exhibit D. It appears in a number of places.

Q. Which one did you compare it with? A. I didn't compare it with one particular one. I compared it with all of them because it shows a consistent similarity.

* * * * *

288 I will put it to you this way: Isn't it a fact that the capital letter "S" even written by the same lady in this document is written in different ways in different places? A. Well, none of the "S's" are exactly alike; not one is a facsimile of the other. They all show that variation that we find in normal genuine writing. No writer can ever even write his name twice exactly alike because, if he does, if we have that situation, one of them is a forgery.

Q. As a matter of fact—let me ask you—compare it with these capital "S's" over here. Isn't there the difference

between day and night when you compare this "S" with the "S" in the word "Supervisor"? Where is there any similarity between those two? A. Looking at the "S" in "Sheriff"—

Q. Yes; or "Supervisor" or any one of them. Here is the word "Sheriff" or the word "Service" there or the word "September" there.

Isn't that completely different from that curlicue
289 of the "S" on the questioned document? How can you say those are the same "S's"? A. Very easily.

Q. I know you can say it easily, but I want to know the facts on which you base it.

* * * * *

The Witness: For the plain and simple reason that they all look alike.

In the word "Supervisor", we have the pen hook into the paper so we have a double line there but we have the same angle of upstroke. We have a loop at the top, although that loop, the corner of the pen is caught in the fold of the paper. We have the pen failing on the way down but, at the base of the "S", we have a loop that consistently appears in some of the "S's". It does not appear in the "S" in "Sheriff", but we do have the retrace up here in "September."

* * * * *

292 Q. We will go all over it again, Mr. Gullickson. I thought I would get one question that would dispose of it.

Isn't it a fact that on this one (indicating) there is a retrace; right? A. Yes.

Q. On this one, there is a loop; right? A. Right.

Q. On this one (indicating), there is no retrace and no loop; right? A. That is right.

Q. On this one (indicating), there is no retrace
293 and no loop? A. That is right.

* * * * *

297 By Mr. Bress:

Q. When you talk about beginning strokes, one way of distinction is that the document not written
298 by the lady has a longer beginning stroke. The document that you claim is of the same handwriting as the lady, the word "Supervisor", does that have any beginning stroke? A. Yes, but it is not one that starts below the line.

Q. Does that have any beginning stroke below the loop?
A. No, that is where it starts.

* * * * *

Q. So the document written by the lady which have the beginning stroke are like the document which she did not sign and the document which you claim she signed does not have the beginning stroke. How do you explain that?
A. Compare them. Look at the length of the beginning stroke.

Q. But there is no beginning stroke on this one
299 (indicating)? A. That is right. It is a very short beginning stroke. It starts right at the loop.

Q. There is no beginning stroke on the one you claim is her writing yet there is a beginning stroke on the one that she wrote and there is a beginning stroke on the one she did not write. How do you reconcile that? A. Let's look at all the "S's". On line 4, the word "Service", the beginning stroke is above the cross line. The word "Street" or "State", it is right at the loop.

Q. Look at the next one. A. The next one, we have a larger capital. The beginning stroke is below the loop.

Q. They are all different, aren't they? Similar, but different? Look at this one (indicating), Mr. Gullickson. Turn to page 3, if you will, please. There is an "S" there I am particularly interested in. Is there any similarity whatsoever between the "S", and you have got a circle around it. I am going to put an asterisk around it. Is there any similarity between the capital "S" there written

by the lady and the capital "S" on the questioned document? A. Certainly there is.

Q. Will you state what that is? A. We have the
300 same line quality; the same thin line. We have the
same degree of touch, the same manner of writing
and the same angle. The proportions of the letter—

* * * * *

The Witness: The proportions of the letter do not agree
with the capital "S" written on Exhibit E.

By Mr. Bress:

Q. I now ask you the same question I asked before and
see if you are prepared to give me a different answer. Is
it not a fact that the "S's" in the document which is the
Civil Service application which is concededly Mrs. Maske's
handwriting, the "S's" are lacking in uniformity and
that there is no great similarity or dissimilarity between
some of the "S's" in this document and the questioned
document and the "S" that appears in the document which
she concededly did not sign? You still will not change
your position? A. No; I cannot see any reason to change
that position because the documents themselves indicate
otherwise. The writer of Exhibit D writes a number of
different types of "S's". There are at least three differ-
ent types of "S's" appearing on the document as far as
style is concerned.

* * * * *

301 By Mr. Bress:

Q. Did you take these documents to your labora-
tory yesterday? A. No; I did not.

Q. You took one look out in the hall and gave your
302 opinion? A. That is about all this required.

* * * * *

303 Q. Yes; but I say at that place does it not appear
in the basic document there are rounded "u's" in
many cases? A. To the best of my recollection, all

304 of the "u's" in Document D have a rounded bottom.

Q. And they do not have it in the word "Supervisor"? A. No; the "u" in there does not have it.

Q. Let's take the next letter, the letter "p". Is it not a fact that in many of the "p's" in the basic document, there are loops in the "p's" where there is no loop in this "p" (indicating), the bottom loop under the line? A. Do you mean on the stem of the "p" or do you mean in the connection where the line leaves the bottom of the "u" going over toward the "e"?

Q. The part of the "p" that comes under the line. Isn't that the stem? A. That is the back stem of the "p". That which appears on Exhibit E has no—

Q. No loop? A. No loop.

* * * * *

305 Q. Aren't many "p's" in this document dissimilar from the "p"— A. No; I would not say they are dissimilar. There are many "p's", the same appearing in that document (indicating), just as there are variations in the "S". Nevertheless, we have the general consistency of appearance in the manner of writing.

Q. On this document, there appears, in pencil, "W. M. & A." and the word "White" in pencil. That is obviously a different handwriting from any other handwriting on the paper or is that similar, in your opinion? A. Well, I had not paid any attention to it. I mean I had not compared it but it appears different.

Q. And by making that glance that you have just made and not having noticed that before, is it your opinion then that the words "W. M. & A." and "White" are different from the handwriting in the body of the document? A.

That I don't know.

306 Q. You don't know by looking at the pencil writing on this document whether it is the same or similar to the other handwriting on the document? A. Well, it is not similar but whether it was written by, for example the word "White" written by the person who wrote in

the main document, that I don't know. That is a matter of comparing pencil writing with pen and ink. I don't have any idea under what circumstances "White" was written. It apparently was just scribbled on there.

Q. Do you know the circumstances under which the word "Supervisor" was written on there? A. It apparently was written carefully.

Q. Is that what you mean by knowing the circumstances under which it was written, whether it was written with care or without care? A. That is right. The word "White" shows no care in writing at all. The word "Supervisor" shows care in the manner of writing.

Q. Does the word "White" appear in a very fine handwriting? A. I would say no.

Q. Would you say the word "White" was written by the person who signed this statement, Dr. E. W. Schwartz? A. That I don't know.

Q. Was the word "White" written by the person
307 who wrote the word "Supervisor"? A. I would say no.

* * * * *

310 I show you a capital "E", capital "O" and "P", and above the "Mrs. Edith O. Pierce," which appears in the basic document, Defendant's No. D, I ask you whether or not there is any difference between the "Edith O. Pierce" in the basic document and the "Edith O. Maske" in Defendant's No. C in evidence. I show you two "E's", one "Edith O. Pierce" and the other "E. O. P." and I ask you if that is dissimilar from the "Edith O. Maske" in that document (indicating)?

311 A. There is dissimilarity in the manner of writing the capital "E". The "E" in the remainder of the signature, as far as comparison can be made, is consistent in the writing.

* * * * *

313 Q. The two words are completely different in size? A. That is true. They are different in size. One is

larger. The more rapidly written one is larger but I would hesitate to give an opinion and base it upon the single word, single name of "Edith".

Q. And if these two words, "Edith," were written by the same person six or seven years apart, would you say that would be consistent that there might have been a change in the handwriting during that period? A. That difference would be consistent in writing the two words fifteen minutes apart, let alone six or seven years.

Q. It just depends on how it happens to be written? A. A person has that much variation in writing.

* * * * *

Mr. Roberson: Now, Your Honor, I had previously asked permission to read Defendant's Exhibit E to the jury. May I now do that?

Mr. Bress: May we approach the bench?

* * * * *

314 Mr. Bress: Consistent with the defendant's purpose, they want now to read this document in evidence.

The purpose of my objection before was that this document is not admissible in evidence. The fact that this witness has now identified handwriting, the one word on the document without there being a showing when that word was put on the document, I submit that the body of the document is not admissible in evidence and the mere fact that this evidence tends to show that this word is in the same handwriting as some document many years before written by her does not make this document admissible and I object to its admissibility.

I think that the jury is permitted to see the comparison of handwriting to determine the weight to be given to this man's testimony but this document is not admissible in evidence for any purpose and certainly not to prove the truth of matters contained in it. It is being offered mainly for the purposes of impeachment and that affects

the credibility and determines what instruction the Court will give to the jury if and when it is submitted to them for examination.

The Court: I think, in the state of the record with respect to the instrument, that it is admissible at this
315 time and the Court will overrule the objection.

* * * * *

316 Mr. Roberson: (Reading Defendant's Exhibit E):

317 "Medical Report

"Patient's name: Edith Maske."

The age is blank.

"Address: 6060 Brooke Road.

"Occupation: Clerk."

That is marked out and underneath it is the word "super-visor."

"Employed by: United States Government.

"History of condition; date of accident: July 9, 1947.

"History described by patient: While a passenger on a bus, public conveyance, bus and an auto almost had a collision. The bus stopped suddenly and another passenger stepped on or hit the top of the instep of the right foot.

"Date of your first treatment: July 18, 1947.

"Date of your last treatment: Still continuing.

"X-ray, date taken: July 19, 1947.

"Where taken: Providence Hospital.

"Findings: Negative for fracture.

"Diagnosis: Subperiosteal hematoma and subcutaneous hematoma of dorsum of right foot. Pain and inability to stand on this foot.

"Contributing factors. In your opinion, is the condition the result of above described accident solely?
Yes.

318 "Prognosis: Total disability: Undetermined. In bed.

"Estimated cost of medical treatment: Undertimed.

"(Signed) E. W. Schwartze.

"Address: 1225 Talbot Street, Southeast.

"Date: July 29, 1947."

* * * * *

320 Mr. Bress: While we are here at the bench, Mr. Roberson, I understood you to say one of your witnesses was going to offer records from Walter Reed Hospital?

Mr. Roberson: Yes.

Mr. Bress: I would object to those records being admitted in evidence. I don't know why we have to go into the 1945 amputation as having any bearing in this
321 case. If it has any relevancy, I should like to know it.

Mr. Roberson: I would like to state it has bearing in this sense: The plaintiff stated she did have an amputation at Walter Reed in 1945 whereas the fact, as will be shown by the history at Walter Reed is that she had her amputation way back in 1929. There was no amputation at Walter Reed because she had already been amputated. All they did was fix up a recision on the stump.

Moreover, it is revealed in the Walter Reed record that, in so far as this right ankle which is involved in this law suit, is concerned, that it was deformed in 1945 whereas the plaintiff has testified here that her right ankle was perfectly O. K.

Mr. Bress: Taking up point by point: First, as to the amputation, I think if you will look at the record, you will find that you are in error about that. The amputation that we have previously stated to the Court was that she had lost, in that explosion, only the toes, the front part of the foot and she did wear some little prosthesis for that part of it but the amputation to just below the knee was done in 1945 at Walter Reed.

However that may be, those records are not admissible in evidence for two reasons: One, how much of her leg was cut off in 1945 is immaterial to any issue in this case. Secondly, you cannot attempt to impeach on imma-

322 terial issues as the rule of law is, as practiced here, and, third, the records of Walter Reed Hospital are privileged and these gentlemen have no right to produce them.

Mr. Roberson: The pretrial order takes care of that. It says that the hospital records may be admitted without proof. We were hoisted on that petard yesterday.

The Court: If the defendant has some theory that the original condition, as testified to, has some effect on her general state of health, general physical condition which, if considered, would create a situation that would form the basis for a comparison between her physical status at the time of the injury and the present time, it might be admissible on that theory.

Mr. Bress: Under the decisions of the Court of Appeals, the history that appears in hospital charts is not admissible in evidence at all. They are presently not admissible to the extent of impeaching on immaterial issues.

The Court: They may not be submitted. If you have anything in opposition, you will have an opportunity to present it to me.

Mr. Bress: May the record show we object to the admission of any records from Walter Reed on the grounds that I stated.

The Court: I will pass on that when they are offered.

* * * * *

327 The Court: To simplify the matter, I will let the deposition be read.

* * * * *

Mr. Roberson: I wish to read the questions and answers from the deposition taken on March 13, 1948:

"Question. Where are you employed, Mrs. Maske?

"Answer. Veterans Administration.

"Question. In what capacity?

"Answer: I am a supervisor."

* * * * *

328

Catherine S. Porter

was called as a witness by and on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Roberson:

Q. Will you state your full name, please?

A. Catherine S. Porter.

Q. Where are you employed?

329 A. Information Clerk, Adjutant General's Office.

Q. Mrs. Porter, in response to a subpoena, have you brought with you the records of Walter Reed Hospital pertaining to Edith O. Maske?

A. I have.

Q. When did they arrive, Mrs. Porter?

A. They arrived yesterday afternoon from St. Louis, Missouri.

Q. What is the practice with respect to military hospital records as to preserving them at the hospital or sending them to St. Louis?

Mr. Bress: I will concede, if the Court pleases, what the lady has produced are the Walter Reed Hospital records.

* * * * *

330

Frank M. Hand

was called as a witness by and on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bress:

Q. Your name is Dr. Frask M. Hand and you are a practicing physician and surgeon in the District of Columbia?

A. Yes.

Q. Dr. Hand, you specialize in any particular branch of medicine?

A. Orthopedic surgery.

* * * * *

333 Examination on this same day, December 14, 1948, the fibula on this side is very broad at the malleolus level, the ankle level, where the bones are rather prominent. She has complete extension; says that the knee is uncomfortable in this position; has a quinus of this side.

334 "Quinus" means the foot is pointing downward.

* * * * *

338 Q. Dr. Hand, what was your interpretation of the X-rays that you received from Dr. Frohman?

A. Well, if I may read my own dictation which is not a report, that will help you, I believe.

Q. Yes.

A. This is my own dictation in my office at the time:

"February 15, 1949.

"X-rays taken on the second of December, 1948, of the right ankle show a rather marked disturbance about the joint space with a diminishing of this space.

339 There is a roughening of the joint surfaces. Several detached small fragfents. A displacement of the posterior portion of the oscalis, wrich is the heel bone, and some involvement of the astragalus which is the main weight bearing bone, you might say, in the ankle."

* * * * *

A. This is dated March 1, 1949.

"Examination: In walking, when weight is placed on the right leg, the ankle and foot are thrown into an inverted position which tends to reduce the bowing of the leg and ankle. The present prosthesis or the artificial limb on the left has been used since 1945 and there is some roughening of it due to wear.

“Motion of the foot is painful. The pain is localized to the outer aspect anterior below the level
340 of the fibula. The fibula is the smaller of the two bones.”

Q. The fibula is the smaller of the two bones that goes from the ankle to the knee?

A. Right. Plantaflexion, which is downward motion, measures 148 degrees. Dorsoflexion, which is the outward motion of the foot, at the ankle measures 122 degrees. She has a few degrees of lateral motion.

“Suggest fusion of the ankle in neutral position.”

Q. What do you mean by “Suggest fusion of the ankle”? What does that mean?

A. “Suggest fusion of the ankle” means to stabilize by operation; making loss of motion at the ankle, making a stiff joint.

Q. Does that require a cutting of the ankle and the performance of an operation under the skin?

A. Yes.

Q. What is involved in a fusion? Will you explain that a little more in detail?

A. A fusion means that you have to open the joint, completely, and remove some of the surfaces of the bone and place them together with some type of fixation, whether it be transplanted bone or metal-like fixation and immobilized in a cast for quite some time.

Q. Is the result of that operation such that there is
341 no motion at all in the ankle? It is a stiff joint?

A. It is a stiff joint

* * * * *

343 Q. Doctor, in the light of the history that you received or let me furnish some additional history based on matters in evidence:

Prior to your seeing this lady, will you assume that she had dislocation of the digits or the toes of her right foot

and she had pain and swelling in the right foot in an area of four by two and one-half inches on the top part of the foot and she had a fracture of the navicular bone on
 344 the right foot. A walking cast was applied.

Thereafter, on July 21, that cast was removed for X-ray purposes and a new cast was applied and the X-ray examination at that time showed some arthritic condition posterior to the tarsal joint with some ankylosis.

That X-ray determination was made by Dr. Joseph Bellair. You know him?

A. Yes.

Q. The next day, on July 22, the cast applied on the 21st was removed due to pain and re-X-rayed and a new cast reapplied. An X-ray examination of that time showed no previous change and the cast was reapplied. A larger and more comfortable cast, that was.

Due to extreme pain between the dates July 23 and July 28, the patient was treated for pain and edema due to the pain, dressed and redressed on July 31 and August 2. The leg was swelling continuously. Patient was unable to stand on it.

The patient was treated for pain, swelling and irritation. On August 8, the veins in the foot were larger than before. The area showed a dark green discoloration. There was a thrombosis of the vein in the right extremity and, from August 11 to September 11, the patient was treated and got considerably better.

The prognosis, at that time, was that there was a
 345 thrombosis in the foot which might result in an embolism formation with serious complications and poor circulation of the lower extremity which was determined to be such that might lead to gangrene, making the patient a total invalid.

In the light of that history plus the fact that prior to July 9, the date on which this lady's foot was injured, she had no difficulty in the use of that foot nor paid in it; that beginning in November of 1947—I have given you the

history up to September of 1947—beginning in November of 1947, she was under the care of Dr. Frohman and remained under Dr. Frohman's care until December of 1948 when she was referred to you and, under Dr. Frohman's care, she received extensive diathermy treatments.

Then the condition you found was such as you have related to the end of '48 and early '49.

In the light of those facts, Doctor, will you please state, in your opinion, whether the condition of this lady's foot and ankle was such as, in your opinion, was the result of injury.

A. I would say that injury could influence such a picture, that is, with that history, but whether or not definitely it was due to trauma, I could not say.

Q. In the light of that history, if that history is correct, what influence would trauma have in producing that condition which you found?

A. Oftentimes, as the result of fracture and injury
346 to the sore structures, there is a residual arthritic change which is a progressive type of change.

Does that answer your question?

Q. Yes.

What is the effect of trauma superimposed on an arthritic condition? Does that frequently aggravate it or not?

A. Yes; it exaggerates the symptoms.

Q. What bone of the foot is the navicular bone?

A. The metatarsal bone which is the weight bearing bone, partially.

Q. Would the fracture of that bone impair the ability of the person to bear weight on the leg?

A. If it did not heal, it would.

Q. If it healed, it would not impair?

A. Would not impair weight bearing.

Q. With respect to the effect of the trauma upon a foot that had a fracture of the navicular bone and dislocation of the digits or the toes and showed some arthritic condition during the same month and that has progressively in-

creased up to the present time, what is your opinion, Doctor, as to whether or not the progression of that condition is aggravated by trauma?

Mr. Roberts: May we approach the bench, Your Honor?

The Court: You may.

(Thereupon, counsel approached the bench and the
347 following proceedings were had out of the hearing
of the jury.)

Mr. Roberson: Your Honor, this attempt to convert his case into one for aggravation is one entirely different from that presented at pretrial when the plaintiff was contending that the injury to the foot was the direct cause of whatever her disability was. There was no contention there that we aggravated an arthritic condition, that is, that was our conception of the pretrial order.

The Court: I don't think that situation would be such to preclude this testimony.

* * * * *
348 Q. Doctor, when was the last time you saw Mrs.
Maske?

A. August 4, 1949; examination:

"She has some swelling and some pain. On weight bearing, she has pain. There is tenderness along the anterior joint space line."—that is at the very front of the ankle—"it is tender over both malleoli with percussion. A few degrees of anterior-posterior motion," that is, upward and downward motion—"foot is held in 45 degree angle of plantaflexion.

"Advice—same."

* * * * *
Q. Was your opinion still at that time that a fusion operation was indicated?

A. Yes.

Q. And if there has been no improvement in the condition of her foot as of the present time and pain still persists,

would you still recommend that such an operation be performed?

A. Yes.

* * * * *

351 Q. Doctor, what is your opinion as to whether or not this lady will improve unless she undergoes the operation?

A. I don't believe she will improve very much, judging by our previous examination.

* * * * *

Q. Does the fact she has on artificial limb on her other leg make the result of a fusion operation on the other one more serious?

A. Yes.

* * * * *

352 Q. Doctor, if I had a fused ankle, would my ability in walking, to use that, be merely to put it down flat? Is that correct?

A. It would be placed in what we call an optimal position or neutral position with the foot pointing downward a little bit and the weight bearing line centered so you would not have to reach too far forward to get weight on it.

Q. And you would fix that position?

A. At the time of operation.

* * * * *

354 Cross-Examination

By Mr. Roberson:

Q. Dr. Hand, in this hypothetical question put to
355 you by counsel, you assumed a fractured bone, did you not, as one of the elements?

A. Yes.

Q. And so your testimony with respect to aggravation of arthritic condition assumed a crushing injury to the foot, is that true, sir?

A. Well, just a fracture as mentioned. I didn't use the term "crushing".

Q. But it is a fact if there were no fracture, your opinion would be affected by that, would it not, sir?

A. Yes.

Q. And it would be to the contrary, assuming the facts given you by Mr. Bress with the exception of the feature that there was no fracture of the bone following this alleged trauma?

A. Yes; it would affect my opinion.

Q. And your opinion would be, then, that if there were no trauma then probably that was not the cause of the arthritic condition that you saw; is that correct, sir?

A. That is true.

* * * * *

356 Q. As I understand your testimony, when you ex-
 357 amined her in '48 and '49, what you found could not
 have resulted from a subperiosteal hematoma and
 subcutaneous hematoma of the dorsum of the right
 foot?

* * * * *

Q. The condition which you saw in the lady's foot, in the ordinary course of events, is one that was not aggravated by trauma, isn't that correct, sir?

A. I could not say.

Q. You can't say one way or the other?

A. No.

Q. Could it result from disease, Doctor?

A. Yes.

Q. Isn't that the probability?

A. I don't know what you mean by "probability".

Q. Isn't that the great likelihood ?

A. It is likely that.

* * * * *

358 Q. What is a quinus deformity, sir?

A. A quinus, it is the downward position of the foot, like a horse's foot.

Q. Assume the truth of this fact, Doctor: That on July 20, 1945, the plaintiff's right ankle was X-rayed and this was the finding:

"There are extensive hypertrophic changes about the right ankle, foot and tarsal bone. There is a quinus deformity of the foot and considerable deformity of the tarsal bone. No evidence of recent injury."

That was in 1945. Assuming the truth of those facts, Doctor, would that indicate to you that the condition you saw in '48 and '49 was probably a developmental thing as distinguished from caused or aggravated by any stepping on the instep of the foot?

A. If that report were true, I would.

Q. I have asked you to assume that.

A. Assuming that, I think that the trauma had not too much to do with it.

* * * * *

Redirect Examination

By Mr. Bress:

359 Q. Doctor, is a limb which has arthritic changes in it a common thing amongst people in their early 40's or late 30's and is not accompanied with pain?

A. Is it the usual thing?

Q. Is it the common thing?

A. No; it is not a common thing.

Q. You find that many people have arthritis without knowing they have got it?

A. No.

Q. Do you have people who have arthritic changes and do not suffer with pain as the result of it?

A. It is not the usual thing.

Q. Arthritic change is a progressive thing, is it not, as we grow older, in many people?

A. Yes.

Q. And if a person who has an arthritic development in any limb, taking this case, the foot and ankle, is that person likely to suffer more as the result of the trauma to that limb than if they didn't have an arthritic condition?

A. Yes; it always aggravates symptoms.

Q. When you have a condition of hypertrophic changes in the member that we are referring to and if you have a fracture of the navicular bone and, as the result of a crushing blow of several steps, one or more steps by the high heel of a shoe of a woman stepping on the top of the instep, would the reasonable probability be, from
 360 striking the foot which already has some hypertrophic arthritic changes, that such arthritic condition would be aggravated by this kind of an injury?

A. Assuming the first part to be true, it would aggravate the symptoms.

Q. And the extent to which it would aggravate, Doctor, is the probability such that it might aggravate it to the point of making the limb useless or making it as useless as it is to this lady in this case?

A. Yes; I believe so.

* * * * *

Q. Let me ask you this: She had some, in the assumption, some hypertrophic arthritic changes. She could have gone through life with that without requiring a fusion operation, could she not?

A. Probably so.

Q. Many people have that, don't they?

A. Yes.

Q. And the effect of a fracture and a crushing blow causing the hemorrhage under the periosteum aggravated that condition and rendered the foot in the condition in
 361 which it is today, is that not correct?

A. That I can't determine since I didn't see her in the beginning.

* * * * *

362 By Mr. Bress:

Q. In my assumed facts that I gave you earlier, Doctor, I told you there was a thrombosis of the vein. I just want to ask you now whether a thrombosis the size of a small walnut, is that something that would result from trauma?

A. Yes.

Q. Subperiosteal hematoma, what is the usual effect of a subperiosteal hematoma upon a prior arthritic condition as to whether or not it is an aggravating factor in it?

A. It might very well aggravate a preexisting condition.

Q. (Reading): "Subperiosteal hematoma and subcutaneous shematoma or dorsum of right foot."

363 Doctor, what is the significance of the fact that this lady, even though she had some arthritic condition in her foot and ankle prior to this accident, had no pain or disability in that ankle and was able to bear the weight of her body on it without pain? What is your opinion, as a result of that fact, as to whether or not the arthritic condition that she had prior to this injury was of no great importance; if it did not produce pain.

A. The hematoma, as I understand your question, it would depend entirely upon its location as to whether it would affect an arthritic condition or not. In other words, if it is along the shaft, in the top, as they describe it, it would not have any real effect on the arthritic condition.

Q. But it depends on how extensive that hematoma could be?

A. Yes.

Q. The bone that was broken, the navicular bone, fracture of the navicular bone, is that underneath the tarsus of the foot?

A. It is on the side of the foot.

Q. Would an arthritic condition in that area be aggravated by a subperiosteal hematoma in that area?

A. Yes.

* * * * *

364

Allen B. Coleman

was called as a witness and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Roberson:

Q. Your name is Allen B. Coleman?

A. That is correct.

* * * * *

365 Q. I see by your uniform you are a Maryland State Trooper at the present time?

A. That is correct.

Q. What was your employment, Mr. Coleman, in July of 1947?

A. I was a bus driver for W. M. & A. Motor Lines.

Q. Did there come a time in the afternoon of July when a lady on your bus claimed to have sustained an injury?

A. I don't remember the exact time of day it was but I am pretty sure it was the evening rush hour that that incident occurred.

Q. Do you recall where you were going, where your trip originated?

A. It had originated at the terminal at 11th and Pennsylvania Avenue, Northwest.

Q. What was your next stop after leaving your terminal?

A. It was, I am pretty sure, at 7th Street on E Street, just east of 7th Street.

Q. Heading in which direction, Mr. Coleman?

A. East.

Q. What was your next stop after that, sir, for any reason?

A. The traffic light at 6th Street.

Q. That light was red when you reached that?

366 A. Yes, sir, it was.

Q. Will you explain to the Court and jury the circumstances of this lady's accident, as you know it?

A. I had stopped for the red light there at 6th Street and when it turned green, I went on across the intersection. I didn't shift gears until I crossed the intersection because we were taught in school never to attempt to or to shift

gears while you are traversing an intersection. The bus had cleared the intersection when I did shift to second gear.

Just about that time, a taxicab, a black taxicab, privately owned, driven by a colored woman pulled out from the curb and stopped right in front of me. At that time, I was in the center lane on the right-hand side of the street. That left one traffic lane open eastbound on the left of me and there was a parking line to the right of me. When the cab pulled out, I came to an abrupt stop. I jammed on the brakes.

Q. What was your approximate speed that you had attained at the time of that stop?

A. I was traveling at approximately 10 to 12 miles an hour.

Q. Had the taxi been at a standstill as you approached it on this lane of parked cars?

A. As far as I can recall, it was at a standstill and then it pulled out in front of me.

367 Q. Approximately what was the distance separating your bumper from the taxicab at the time you made this stop?

A. I can't recall the exact distance but I would say it was approximately eight feet.

Q. Was the taxicab then at a standstill?

A. Yes, sir, it had come to a complete stop.

Q. What happened to the taxicab thereafter?

A. Well, it didn't hesitate but about a couple of seconds and then it went straight east.

Q. Did you have an opportunity to get the number of the license tag?

A. No, sir, I did not.

Q. What did you do after making the stop that you have described?

A. I immediately asked if anyone was injured on the bus because I had had standing passengers on the bus and it threw them forward. The woman sitting behind me, on the longitudinal seat, said yes, she was injured, and I pulled

across the street and up close to the curb so the rear of my bus cleared the intersection and stopped and then took the necessary information down.

* * * * *

368 Q. Are you familiar with Georgetown Law School?

A. Yes, sir, I am.

Q. Where was your original stop with respect to the entrance of Georgetown Law School?

A. You mean when I made the emergency stop?

Q. Yes.

A. It was just about in front of the law school.

Q. And then after your sudden stop, you pulled on across Fifth Street, did you?

A. That is correct.

Q. And made another stop?

A. That is correct.

Q. Were you then closer to Fifth than you were to Fourth when you made your final stop?

A. Yes, sir, I was. I had just cleared the intersection of Fifth Street.

Q. What did you do after you pulled over to the curb?

A. I asked Mrs. Maske how bad she was hurt and I think I asked her if she wanted me to call an ambulance.

Q. Did she ask you to call the police?

A. No, sir.

Q. Did she ask you to take her to the hospital or send her to the hospital?

A. No, sir. She just said, "Make out a report of it".

* * * * *

369 By Mr. Bress:

Q. Mr. Coleman, at the time of this accident you had just completed a course in learning how to be a bus driver

370 and you had not been driving but about four to six weeks, is that correct?

A. That is correct.

Q. And do you know what run you were on?

A. No, sir, I can't recall what run it was now.

Q. And this learning that you had in being a driver, was that a school conducted by the bus company for about two weeks?

A. Yes, sir, it was.

Q. And after that two weeks' training, were you put on this run?

A. Yes, sir.

Q. And you started that school sometime in May and you finished the school two weeks later and this accident occurred in early July?

A. Yes, sir.

Q. You say that the taxicab that you saw was a black taxicab?

A. Yes, sir.

Q. It wasn't a Yellow and it wasn't a Diamond?

A. No, sir.

Q. And it was not light-colored?

A. No, sir.

Q. It was black?

A. It was black.

371 Q. And you could see it well enough to know that there was a colored lady driving it?

A. Yes, sir.

Q. And when you first saw that taxicab, it was stopped parallel against the curb, was it not?

A. Yes, sir, it was.

Q. And it was standing still and you were coming east and it was headed east but stopped along the curb?

A. Yes, sir.

* * * * *

Q. You know about any cars being parked there. What was parked there?

A. Offhand, I don't recall what was parked there.

Q. How close is it from where you say the accident occurred in the block between Fifth and Sixth Street on the south side of E Street, how far is it from the entrance

372 to the Georgetown Law School to the building line on the east side of Sixth Street?

A. On the east side of Sixth Street?

Q. Yes; in other words, the school goes from its entrance in a westerly direction to the building line of Sixth Street.

A. That is correct.

Q. How long is that?

A. Offhand, I don't know.

Q. Where was the taxicab when you first saw it with respect to the building line of Sixth Street?

A. It was approximately in the middle of the block.

Q. Was it the middle of the block where the entrance to the school is?

A. Just about.

Q. So that when you first saw that taxicab it was, shall we say, parked along the curb in front of the entrance of the law school?

A. It was in front of the law school but I won't say it was the entrance to the law school.

Q. Where would you say it was closer to, Fifth Street or closer to Sixth Street?

A. I would say it was a little closer to Sixth Street.

Q. It was there somewhere between the entrance of the school and the building line of Sixth Street, is that correct?

373

A. Yes, sir.

Q. From the entrance of the school to the east curb line of Sixth Street, do you know how far that is approximately? Would you say 100 feet?

A. No, sir, I don't.

Q. Do you have any idea whether it would be 100 feet, 200 feet?

A. No, sir, not now. I haven't been up there for a long time.

Q. Do you know whether or not there were any cars at all parked between the building line of Sixth Street on E to the entrance of the law school, and, if so, how many cars, approximately, were parked there, if any?

A. Well, I don't know for sure.

Q. Did you ever, in driving on this particular street, observe cars parked on the south side of E Street between Fifth and Fourth?

A. No, sir.

Q. There is no parking allowed between Fifth and Fourth, is there?

A. No, sir.

* * * * *

374 Q. You testified by deposition in November of 1948, did you not?

A. I think that was the date.

Q. Your recollection was a little clearer then than it is now?

A. Yes, sir.

Q. With respect to this other car, this taxicab, if it was parked along the curb, as I understand it, you saw that taxicab start up, did you not, from a standing position?

A. Yes, sir.

375 Q. When you saw it start up, was there any car in front of you?

A. You mean parked in front of the taxi?

Q. Yes.

A. Yes, sir, I am pretty sure there was.

Q. When you saw it start up, can you tell us how fast it started up?

A. No, sir.

Q. When the taxicab started up, did the taxicab have to do any backing and going forward to get out of the parking lot?

A. No, sir, it just pulled right forward.

Q. Did you see any passengers getting out of it?

A. No, sir, I didn't.

Q. When you first saw it when it was at a standstill, how far away was it from the front of your bus?

A. I can't recall how far it was.

Q. How many car lengths or bus lengths was your bus from the taxi when you first saw it?

A. I don't recall just how far it was.

Q. Can you point to any object in this room as to how far the taxicab that you are referring to was from you when you first saw it?

A. No, sir; because it has been too long ago.

Q. As a matter of fact, when you testified in November, 1948, you didn't know how far it was from you when
376 you first saw it standing still, is that correct?

A. I guess you can say that.

Q. After you first saw the taxicab and saw it begin to move, do you remember how far you were from the rear of that taxicab when it first started moving forward?

A. No, sir, I don't.

Q. And when it first started moving forward, how far did it get out in the lane immediately next to the parking lane before it got in front of your bus?

A. It just pulled out and straightened up, straight east, and then it stopped.

Q. Pulled out and straightened up?

A. Yes, sir.

Q. During the process that it was pulling out from its position along the curb, you had your eyes on it?

A. Yes, sir.

Q. You had your eyes on it to the point of even noticing what sort of person was driving the cab?

A. Yes, sir.

Q. During that time that the cab was pulling out from its parked lane to get into another lane, you were watching that cab the whole time. While it was pulling out, sir, what warning, if any, did you give to the taxicab?

A. No warning at all.

Q. You didn't sound your horn?

377 A. No, sir.

Q. You didn't slow down the speed of your bus either when you saw him start to pull out, did you?

A. Yes, sir, I did.

Q. What was the position of the taxicab when you applied your brakes?

A. Heading straight east.

Q. My question, sir, is, and that is what I understand, the taxicab was already in front of you heading straight east before you applied your brakes, isn't that a fact?

A. No, sir, it was not.

Q. Did you apply your brakes before the taxi was in front of you?

A. Before it got in front, when I saw it pulling out, that is when I applied my brakes.

Q. How far was the front of your bus to the rear of the taxicab when you saw it pull out?

A. I don't recall the exact distance.

Q. Ten, 15 feet?

A. I would say about 10 or 12 feet.

Q. When you brought your bus to a stop, I understand you to say you were still 8 feet behind it?

A. Eight feet, yes, sir.

Q. So, from the time when you first saw it until the time you stopped, do you mean you stopped within four feet?

318 A. I said approximately.

Q. Yes, I mean approximately. You mean you stopped at approximately four feet?

A. Yes, sir.

Q. And when you saw him, when your bus came to a stop, the taxicab was not stopped, was it?

A. Would you repeat the question?

Q. When your bus came to a stop, the taxi was not stopped. It was still going, was it not?

A. No, sir, it was stopped.

Q. What was there in front of the taxicab?

A. Nothing.

Q. Were there any pedestrians in front of it?

A. No, sir.

Q. What was there to make the taxi stop?

A. It stopped for no apparent reason.

Q. Was there any reason why you could see the taxi should pull out of a parking place and then stop?

A. Not unless somebody whistled for a cab. The bus makes a lot of noise.

Q. Did the taxi go on?

A. Yes, sir, it did.

Q. Did you mean when you said you came to a stop that passengers in your bus had been thrown?

A. Yes, sir.

379 Q. And the taxicab was sitting right in front of it, wasn't it?

A. Yes, sir.

Q. You observed the color of it and it was a private cab. Could you not have taken the number of that?

A. Yes, sir, I could have.

Q. How far from the space where the taxicab pulled out from being alongside the curb did the taxicab go before it came to a stop?

A. I don't know how far it was.

Q. Where was the taxicab with respect to Fifth Street when it came to a stop?

A. It was still approximately in the middle of the block.

Q. Well, the taxicab, I understood you to say, was stopped approximately at the middle of the block?

A. Yes, sir, it didn't travel very far.

Q. Well, the taxicab did not move sideways?

A. Yes, I know that.

Q. It had to move forward?

A. Yes, sir.

Q. I want to know how far out of the parking place this taxicab got and how far forward it went before it stopped?

A. As I told you before, I don't know the exact distance.

Q. Was the taxicab on the street car tracks at the
380 time?

A. No, sir, it was not.

Q. Was your bus on the street car lines?

A. No, sir.

Q. Isn't it a fact that when your bus came to a stop that was the second stop that you made?

A. Yes, sir.

Q. You stopped one time and this was the second stop when you threw the people and then you stopped again and distributed the cards?

A. Yes, sir.

Q. Isn't it a fact that you stopped at the regular stop at E Street and Fourth?

A. Yes.

Q. Is there a regular bus stop at Fourth and E?

A. Yes, sir, there is.

Q. Is there any intervening bus stops between the one at Seventh and E Street and the one at Fourth and E?

A. No, sir.

Q. Isn't it a fact when you started on after you had known that people were hurt in your bus, that you went to your next bus stop which is the bus stop at Fourth and E right outside this window?

A. No, sir.

Q. Is it your testimony that after this occurrence, 381 you then crossed the street car tracks on Fifth Street or before?

A. After it occurred, I pulled across the intersection at Fifth and E Street and stopped at the curb with the rear end of my bus just clearing the intersection.

Q. It is not a fact, then, that the rear end of your bus was just clearing the intersection when this stop was made?

A. No, sir.

Q. Was the stop made so abrupt and sudden so it caused people to be thrown?

A. Not to the floor.

Q. It was such a stop as would cause people to be thrown?

A. Yes, sir.

Q. Will you tell us how fast the cab was going when it pulled out.

A. No, sir, I can't.

Q. Will you tell us how fast the cab was going when the cab was in front of you?

A. No, sir.

Q. Will you tell us how far the cab went after it got into your lane of traffic before it indicated to you he was going to stop?

A. He did not indicate to me that he was going to stop.

382 Q. Were there any red lights on the back of the taxicab?

A. Yes, sir.

Q. Don't those lights go on when the brakes are applied?

A. Yes, sir.

Q. Did you see those lights go on?

A. I don't know whether I did or not.

Q. You are not in a position to state that the rear stop lights on the taxicab did not go on?

A. No, sir, I am not in a position to say.

Q. There did come a time when the taxi pulled out in front of you and there were no rear lights on the taxicab, that is, the lights did not go on and the taxicab was moving forward, is that correct?

A. When he headed straight out E Street, he stopped.

Q. After he was straightened out on E Street, he stopped?

A. After he pulled out from the curb and straightened up on E Street.

Q. When he stopped, was there any line of traffic on his right or to his left?

A. No, sir, there wasn't.

Q. There were no cars around?

A. I am sure cars were parked at the side.

Q. Was there anything in front of the taxi?

383 A. No, sir.

Q. And nothing between you and the taxicab to interfere with your view of the taxicab?

A. No, sir.

Q. Will you state how far the taxicab went from its parked position until the time it put on its brakes to stop or stopped or until it stopped?

A. No, sir, I can't even estimate it.

Q. If the taxicab was parked along in front of this jury box and the taxicab pulled out, I want to know how far it went either from the front of it or the rear of it, how far did it go from the time you first saw it move until the time it stopped?

A. I don't know because it happened too long ago.

Q. You didn't know the answer to that question in 1948, did you?

A. No, sir. That was a year and a half after the accident happened, too.

Q. Was the cab at any time proceeding alongside of the bus?

A. No, sir.

Q. Do I understand that you can't at all give us the speed of the taxicab at any time since you saw it in motion?

A. No, sir.

Q. And your maximum speed at any time from the
384 time you first saw the taxicab until the time you made the stop, you say, was not more than 10 to 12 miles?

A. That is right.

Q. And you estimate that the distance it took you to stop was four feet?

A. I would say about that.

Q. Is there anything that has occurred, Mr. Coleman, to refresh your recollection about this thing so that your recollection is clearer today than it was in 1948?

A. No, sir.

Q. Isn't it a fact that in 1948, when this deposition was taken, you were asked this question——

Mr. Roberson: What page are you referring to, Mr. Bress?

Mr. Bress: Page 11, the third question.

By Mr. Bress:

Q. "Question: Was that the only car in the block, that taxicab? Were there any cars parked alongside on E Street?

"Answer: I don't recall offhand whether there was or not but I think there was a few more cars there."

Is that the answer you gave to that question?

A. That is right. That is the answer I gave today,
385 too.

Q. You don't recall now that there were any but you stated you think he pulled out between parked cars?

A. Yes, sir.

Mr. Roberson: I submit that is corroborative rather than impeaching.

Mr. Bress: I don't think so.

The Court: That is for the jury to pass upon.

By Mr. Bress:

Q. Isn't it a fact, Mr. Coleman, when you left the last place where you stopped to pick up passengers, that was at the bus stop at 7th and E before this accident occurred?

A. On E just east of 7th.

Q. And some ladies and children got on at that place?

A. I don't recall who got on.

Q. Isn't it a fact you continued on and made no stops for any stop lights until the stop which was made for this accident?

A. No, sir.

Q. Do you know how far the taxicab travelled during the time it traversed the area while it was stopping?

A. No, sir, I don't.

Q. There was a period during which the taxicab was in front of you and you were aware that it was stopping?

A. Yes, sir.

Q. And during that period that you were aware
386 that it was stopping, do you have any recollection now that the rear stop lights on the taxicab went on?

A. No, sir, I don't know.

Q. You don't know whether they did or not?

A. No, sir.

Q. Were you traveling so close to the rear of that taxicab that if the lights were on you could not see them?

A. No, sir.

Q. How far back from the rear of the taxicab were you at any time while it was out in front of you?

A. Eight feet, when I stopped.

Q. You were eight feet behind it when you were at a complete stop. I am asking you how far back of it you were while he was in motion and you were in motion?

A. I don't know.

Q. You said today when the bus stopped you had some conversation with Mrs. Maske, the lady who was hurt?

A. Yes, sir.

Q. Was that conversation after the bus was between Fifth and Fourth Streets or before it got across Fifth Street?

A. Both.

Q. What conversation did you have with Mrs. Maske prior to your starting up after you stopped suddenly?

A. I asked if anyone was hurt.

Q. Did you get out of your seat when you made
387 that inquiry?

A. No, sir.

Q. You were still sitting in your seat and you asked if anyone was hurt while you were stopped there?

A. That is right.

Q. Did anyone respond?

A. Yes, sir.

Q. Was that Mrs. Maske?

A. Mrs. Maske.

Q. Or did somebody else respond for her?

A. Mrs. Maske.

Q. How soon after your bus stopped abruptly did you ask that question?

A. It could not have been over a few seconds.

Q. The taxicab was still in front of you at that time?

A. I don't recall whether it was or not.

Q. When you asked if anyone was hurt, what did she say to you?

A. She said, "Yes, I am injured. Make out a report of it right away."

Q. And when she said that, that is when you started up across Fifth Street?

A. That is right.

* * * * *

388 Q. Isn't it a fact, Mr. Coleman, that when your bus was traveling east on M Street that you were traveling in the lane closest to the center?

A. No, sir, I was not traveling on M Street.

Q. I mean on E Street.

A. Yes, sir.

Q. You were traveling in the lane closest to the center?

A. No, the middle lane.

Q. The middle lane?

A. On the right-hand side of the street.

Q. You mean there are three lanes?

A. One for parked vehicles and two open lanes for traffic heading east.

* * * * *

389 Q. How far is it from the stop at Seventh and E to the place where this accident occurred, almost two blocks?

A. Almost two blocks.

Q. And during that space, you at no time drove out into the left lane for eastbound traffic? You say you were in the center lane for eastbound traffic?

A. That is right.

Q. You knew at the time you asked Mrs. Maske how badly she was hurt how she had become injured?

A. Yes, sir.

Q. And you saw the lady that was thrown by the abrupt stop that stepped on her foot?

A. Yes, sir.

Q. When did you first realize that the taxi was starting up when you saw it start up or after it got out in your lane?

A. When I saw it start out.

Q. Isn't it a fact that you first realized the taxi
390 was pulling out from the curb when it started out into your lane of traffic?

A. Yes, sir.

Q. And you are still not able to tell us how far you traveled from the time you saw it start up until the time it actually got out into your lane of traffic?

A. No, I cannot.

* * * * *
393 Mr. Roberson: Your Honor, at this time I wish to read to the jury a portion of the official record of the Walter Reed Hospital.

Mr. Bress: Are you reading something that is in evidence?

Mr. Roberson: I am reading it in evidence.

Mr. Bress: The Court has not admitted it?

Mr. Roberson: Your Honor, may we approach the bench?

The Court: You may.

(Thereupon, counsel approached the bench and the following proceedings were had out of the hearing of the jury:)

Mr. Roberson: Your Honor, by virtue of the pre-trial order, I wish now to read certain portions of the hospital records from Walter Reed Hospital.

Mrs. Bress: The stipulation does not render admissible the hospital records.

The Court: That is correct. The stipulation reads:

"It is stipulated that traffic regulations, hospital records and X-ray photographs may be admitted in

evidence without formal proof subject to objection as to relevancy and competency."

394 Mr. Bress: That is right.

The Court: Do you care to make your objection? If so, you may do so.

Mr. Bress: The hospital record of Walter Reed Hospital is not, at least the part that I think is about to be offered, admissible; first: It is not relevant. Secondly, it is privileged. Third, there is no opportunity for cross-examination. It just has every objection that the cases in the Court of Appeals has relied on in excluding hospital records. It has nothing to do with the issues in the case.

The Court: What does the record cover?

Mr. Roberson: Your Honor, I expect to show, by the hospital records, that this lady, contrary to what she testified to, was injured in a railroad accident some 16 years ago; that she then had her foot amputated.

In 1945, when she entered Walter Reed Hospital, it was for a recision of that amputation. It was simply for treatment of the stump. She had already had an amputation some 16 years before.

I expect to show further that, contrary to what she has indicated on the stand, the X-rays at that time indicated that the lady had a deformity of the foot.

The Court: That is the one that was amputated?

Mr. Roberson: No, sir; the one that is involved in this law suit.

395 Mr. Bress: If the Court pleases, in the first place what he proposes, on the first aspect of this offer, is to read some history that appears in a hospital record about there being a railroad accident. This lady says she was never in a railroad accident. She was in an explosion.

If some intern saw fit to put down a railroad accident, that isn't admissible in evidence here to impeach her.

She went to the hospital, Walter Reed, in 1945, to have her amputation. She had had a good portion of her foot

removed since 1929 but I think it goes into immaterial issues to try now to impeach her to show how much of the left foot was amputated in 1929 and how much was amputated in 1945. I think that is getting away from the issues in this case.

As far as the right leg is concerned, I don't believe that the mere showing of a hospital record as to the fact that X-rays were taken and what those X-rays showed is admissible in evidence because that clearly shows no opportunity for cross-examination.

Your Honor ruled the other day that even though I had on the stand the very doctor who took the X-ray and read the X-ray, that I could not get into evidence what the X-ray readings were because they needed the X-rays for cross-examination. Well, I didn't agree with the Court's ruling at that time and I am not asking that the Court make that

kind of a ruling now in my favor. All I am saying is
 396 if the way who made the interpretation is available, then the right of cross-examination is protected, so I say by merely showing a hospital record, that does not make it, in itself, admissible. There is no opportunity for cross-examination.

The Court: The only two questions before the Court are the questions of relevancy and competency and anything else with relation to the stipulation is not before the Court.

As far as competency is concerned, it seems to me they are admissible. If you make the point there is involved in the examination reference to an instrument or effort to get in other evidence, such as X-ray evidence, the Court would sustain that portion of the objection if it were based on X-rays that are not produced.

* * * * *

Mr. Roberson: I can lay the foundation; that I subpoenaed all hospital records and X-ray reports from Walter Reed Hospital. I was advised that everything had gone forward to St. Louis and was in the custody of the Adjutant General.

397 We then got in touch with the Adjutant General and subpoenaed the St. Louis records and this is the entire record which we received. Accordingly, Your Honor, it seems to me that these films——

The Court: If you lay the foundation of that kind, just as the other party is laying a foundation for the X-rays——

You are calling the doctor back?

Mr. Bress: Yes, sir; but he took and read the X-rays. I am not offering in evidence his report.

The Court: I understand, but I would follow the rule of lost instruments with reference to admissibility and include X-rays. I think the authorities are agreed on that.

I find no distinction between X-rays and other instruments. That would be applicable to your situation and I think that would be applicable here.

Mr. Bress: There has been no showing, if the Court please, that the Government X-rays are lost.

Mr. Roberson: I will call the lady back over from the Adjutant General's Office.

The Court: If you insist on that——

Mr. Roberson: If you want me to do that, I will call her back.

* * * * *

398 Mr. Roberson: Mr. Bress, while we are waiting, do you want me to bring the lady over from the Adjutant General's Office?

Mr. Bress: All she can show is that you served a subpoena.

The Court: You will stipulate what she would testify to?

Mr. Bress: I would stipulate, if she were here, that these are all of the records she got from St. Louis.

Mr. Roberson: That is correct, after I asked for all the records and issued a subpoena at Walter Reed, this is all she got.

The Court: I think that will lay the foundation.

* * * * *

400 Mr. Roberson: While we are waiting, I might tell Your Honor my understanding of the case of *New York Life Insurance Co. v. Taylor*, 79 App. D. C.

* * * * *

401 Mr. Roberson: Yes.

Your Honor, it is rather long but 12 and 13 discuss what the shop book rule contemplates as being admissible.

Mr. Bress: Was that in the dissenting opinion?

Mr. Roberson: No, that was Judge Arnold's opinion on rehearing.

The Court: There are two discussions on it, one on the original and one on the rehearing.

I am of the opinion that these two cases support the position taken by the plaintiff in this case. As stated, it covers routine matters but matters of diagnosis and
402 treatment are not intended to be included.

Mr. Roberson: Your Honor, may I make my proffer of proof as to the two different things I am offering?

The Court: Yes.

Mr. Roberson: And I take it Your Honor's overruling applies only to the railroad history and what was done at Walter Reed and not the X-ray?

The Court: I would say it applies to anything with respect to diagnosis as stated in these cases; *Kaplan v. Manhattan Life Insurance Co.*, 71 App. D. C., 250, and *New York Life Insurance Co. v. Taylor*, 79 U. S. App. D. C. 66.

The latter case, both the opinion on the original hearing and on the rehearing, appears to the Court to support the objection.

Mr. Roberson: From the official records of Walter Reed Hospital which have been produced here pursuant to subpoena, I wish to read to the jury these portions of that record:

First, a document called, "Consultation request and report.

"Name: Edith O. Maske.

"Grade: WF-T-5.

"To: Orthopedic Clinic.

"Date: 14 May 1945.

"For consultation: Because of opinion regarding old amputation.

403

(Signed) R. N. Wilson, Captain.

"Date: 18 May, 1945.

"Opinion of Consultant"——

Mr. Bress: After the date, the words "Opinion of Consultant" appear:

"This lady had an amputation of the left leg below the knee performed 16 years ago. She had gangrene at that time and had a second operation performed. A great deal of tissue was left on the stump and this mass of redundant tissue now tends to be sore and the skin over it tends to break down and weep. This stump should be revised to get rid of the redundant tissue. She wishes to have it done in cold weather. She will return at the end of August, 1945, and be placed on the waiting list for admission for this procedure.

(Signed) W. A. Thompson, Captain,
Medical Corps."

Mr. Roberson: The second proffer which I wish to read to the jury was from the abbreviated clinical record on Edith Maske; WFE-wife-T-5, Ward 15.

"Pertinent History. Chief complaint and condition on admission" in the handwriting of Captain Thompson, there appears this——

Mr. Bress: We don't know whose handwriting it is.

Mr. Roberson: It is signed by Captain Thompson.

404 "Amputation left leg below the knee 17 years ago. Left knee and stump gives no trouble except at the end where skin excoriates and mass of

stump end is tender. Wants leg fixed before she invests in new prothesis."

Before that appears these printed words, "Complete physical examination is negative except for the following", and again in pen and ink:

"Left leg—VK amputation. Much redundant tissue at end of stump. It is tender and skin is slightly excoriated.

"Progress: Imp. amputation; below knee; with redundant stump.

(Signed) W. Thompson, Captain."

Mr. Bress: Are you still reading the proffer?

Mr. Roberson: Yes, Mr. Bress.

The third proffer I wish to make is the abbreviated clinical record.

"Name: Edith Maske.

"Grade: Wife T-5; Ward 15.

"Pertinent history: Chief complaint and condition on admission"——

Mr. Bress: What date does that bear? That bears no date, does it?

Mr. Roberson: These are all portions of the Walter Reed Hospital Records.

Mr. Bress: They cover the period from May 405 of 1945, to August of 1945?

Mr. Roberson: Yes, it is still in there. (Reading:)

"Suffered traumatic amputation of left lower leg in R. R. accident approximately 15-20 years ago.

"Chief complaint at present is inability to wear artificial limb due to poor amputation stump."

And on "Progress" the entry, 5 June '45:

"Revision left below knee stump. Removal of fibular and excision tibular exostoses.

"15 June '47: Satisfactory P. O. condition."

Bearing the initials "Y. N. P."

The next proffer of proof I wish to make is from the clinical record brief; Walter Reed GH, Washington, D. C.:

"Maske, Edith O.; Ward 15, Orthopedic.

"Age 37; date of admission, 29 May '45".

Reading, in pen and ink:

"Amputation, surgical; left leg below knee secondary to traumatic amputation incurred in railroad accident 16 years ago.

"Operation: 5 June '45. Revision left below knee amputation stump."

And that bears the signature of the ward surgeon, C. W. Perry.

The final proffer of proof I wish to make from these records is the report of an X-ray of the right foot, 406 the opposite foot, and it has been stipulated here that if the lady from Walter Reed were called, she would testify that the records pertaining to this lady, all the records were brought into court from St. Louis following my subpoena to Walter Reed Hospital for the records and X-rays pertaining to Edith O. Maske.

Mr. Bress: Modify the stipulation to the extent that I agree to stipulate all she would testify would be that, in response to a subpoena addressed to Walter Reed to produce all the records, these are the only records she received from St. Louis. That is as far as I will stipulate.

Mr. Roberson: All the records and X-rays.

Mr. Bress: This is all she received from St. Louis.

Mr. Roberson: That is right.

This is a radiologic report.

"Name: Edith Maske; Ward 15; Rank, Wife of Corporal.

"Part to be examined or treated: A.p. lateral right ankle.

"Clinical diagnoses: Sprain right ankle.

"Date: 19 July 1945."

This is signed by Captain C. W. Perry, M. C.
The report follows:

“There are extensive hypertrophic changes about the
right ankle joint and the tarsal bone. There is
407 a quinus deformity of the foot and considerable
deformity of the tarsal bones. No evidence of
recent injury.

“July 20, 1945. (Signed) A. O. Hampton,
Lt. Col., M. C.”

And above that appears his initials.

Your Honor, it is my contention that many of these things which I have offered in evidence do come within the shop book rule under the decision in *New York Life Insurance Co. v. Taylor*. I think some of these are not subject to dispute but are factual observations about which competent men could not differ.

Mr. Bress: All that has been read is either opinion evidence or matter which is excludable under the doctrine of the New York Life against Taylor and the prior case.

Mr. Roberson: I wish to further point out that that lady opened the door to this by her original testimony. On direct examination, she was asked when she went into Walter Reed and what was done for her at that time. She conveyed the impression to the jury that she was perfectly all right until then and woke up an amputee. I think all this bears on her credibility.

Mr. Bress: May I add that all was brought out on cross-examination and the ruling, as announced by the Court of Appeals in *Ewing v. U. S.*, 77 App. 14, at
408 page 21, where we had exactly this kind of a situation and the Court said:

“It is true, as appellant contends, that generally the inquiring party is concluded by the Witness’ answer when cross-examination relates to a matter collateral to the issues, and he may not later rebut it for purposes of impeachment.”

You can't, by going on cross-examination, get into something collateral and then offer evidence later on, in your own case, to impeach that witness with something that was brought out collaterally.

490 Mr. Roberson: It is not my position that it was so collateral that Mr. Bress failed to bring it out. He was the first one who asked about losing the leg at Walter Reed in 1945.

Mr. Bress: That is not a material issue. It is collateral even if brought out by me or you.

The Court: The Court has ruled.

* * * * *

Mr. Bress: If the Court pleases, I would like to move at this time to exclude from evidence one exhibit which the Court has already admitted and I call it to the Court's attention because I did not have the case before me at the last time and that is that medical report in the handwriting of Dr. Schwartz, defendant's Exhibit E. That has gotten into evidence and causes me no little concern and I
410 think it ought to be excluded.

The Court: What is the number of that exhibit?

Mr. Bress: That is now Defendant's Exhibit E. This is the exhibit which is admitted to be in the handwriting of Dr. Schwartz and has on the one word "Supervisor" which the handwriting expert has testified appears to be in the handwriting of the plaintiff. The only basis on which the defense offered this in evidence, and the Court has ruled that it is admissible in evidence, is for the purpose of showing that one word on it is in her handwriting and, therefore, she has seen it.

The genuineness of this document not already having been shown, I think, under an old decision of the Court of Appeals that has not yet been reversed, *Keyser v. Pickerell*, you cannot, in establishing handwriting, use as a document for purposes of comparison one that is not already in evidence and admitted to be a true document. This was not in evidence. They have gotten it in evidence by showing

that one word on it is similar to another handwriting in another document. The thing does us harm in two ways, Your Honor:

In the first place, the reason that I don't like it here is a doctor who is talking about how the accident occurred which is not consistent with the plaintiff's own testimony.

That is one.

411 Second, it shows the doctor stating he took X-rays on July 19 when, according to other testimony, he took X-rays prior to July 19 and not on July 19 and it shows the finding negative of fracture when the other report, which is in evidence, shows there was a fracture.

Those are the several points that make this highly prejudicial to the plaintiff and make this document not admissible.

As the Court of Appeals said, "Documents otherwise irrelevant cannot be admitted in evidence for the purpose of comparison with disputed writings."

This was admitted in evidence for the purpose of being compared with another writing and it is gotten in, even though in and of itself, it is not admissible and the only thing that got it in evidence is the word "Supervisor" and I think, under this decision, it ought to be excluded.

Mr. Roberson: Does Your Honor wish to hear me?

The Court: I will hear you briefly.

Mr. Roberson: The point is the widow testified this all was in the doctor's handwriting. Mr. White testified he sent this particular piece of paper to the plaintiff with a covering letter telling her to get it filled out by her doctor and to return it to the defendant.

The Court: I don't know that you need go any further. I am going to sustain my original decision on this.

* * * * *

414

Edith O. Maske,

the plaintiff, was recalled as a witness and, having been previously duly sworn, was examined and testified as follows:

Recross-Examination

By Mr. Roberson:

Q. Mrs. Maske, you told us on direct examination and on cross-examination also that before this accident of July 9, 1947, you had had no trouble with your right ankle, no arthritis. That is correct, is it not?

A. I was never told I had arthritis, no, sir.

Q. My question is that is what you told us on direct examination; that you had no trouble?

A. Yes, sir.

415 Q. I will ask you if this is not true, Mrs. Maske, that on July 19, 1945, you sustained a sprain of your right ankle; that you went to Walter Reed Hospital and there had your right ankle X-rayed and that at that time——

Mr. Bress: I object, if the Court pleases, and I will move to withdraw a juror if Mr. Roberson continues to read matter which is not admissible in evidence.

Mr. Roberson: I think I have the privilege of asking her if it is not a fact, Your Honor, that her right ankle was X-rayed at that time.

The Court: You have not propounded any inquiry that raises any error up to this time.

The Witness: Not to my knowledge, sir. It could have been X-rayed but not to my knowledge.

By Mr. Roberson:

Q. You didn't know that you went——

A. I was taken down for X-rays, yes, but I was lying bat. I don't know. Maybe they X-rayed both legs.

Q. At that time, you didn't have a left ankle, isn't that true?

A. Yes, sir, I did have a left ankle.

Q. Mrs. Maske, your left ankle was amputated in an accident 17 years before, was it not?

A. Not my ankle, no, sir.

Q. You told us that on direct examination, however,
416 didn't you?

A. No, sir.

Mr. Bress: Told us what?

By Mr. Roberson:

Q. That your lower limb was amputated some 15 years before this accident?

A. Not my leg.

Q. When did you start wearing a prosthesis or artificial foot?

A. I had half of my foot. I had my heel and all.

Q. Can you answer my question as to when you started wearing an artificial foot?

A. A whole foot?

Q. An artificial foot, yes.

A. I started wearing an artificial limb in 1945, sir.

Q. You started wearing an artificial foot long before that, didn't you?

A. No, sir; part of a foot I did, yes, sir.

Q. To get back to this right ankle, you did sprain your right ankle on or about July 19, 1945, and had it X-rayed at Walter Reed. You remember going down and having it X-rayed, do you not?

A. No, sir, I don't.

Q. You don't deny that that is a fact?

A. I do not. I could have been X-rayed.

* * * * *

417 Mr. Roberson: I submit it is important in this case that the showing be made that the X-rays show there is a loss——

Mr. Bress: Counsel is improperly trying to get in evidence what the Court has already denied. There is nothing new brought out by the testimony of this witness that would make this record now admissible in the light of the Court's prior ruling.

The Court: I think the Court will adhere to its prior ruling. I do not believe that the situation has changed since the witness went on the stand.

Mr. Roberson: Your Honor, I would like to point out that "don't remember" is equivalent to denial for the purposes for which I want to use this X-ray report.

The Court: The Court has ruled on the matter.

* * * * *

Dr. I. Phillips Frohman

resumed the witness stand and was examined and testified further as follows:

418 Direct Examination—Resumed

By Mr. Bress:

* * * * *

420 Q. When you examined this lady, what did that examination reveal on November 22?

A. At the time I saw her, she complained of pain and stiffness of the right ankle. Examination showed quite a bit of swelling of the right ankle joint and of the right foot with exquisite tenderness to pressure and some, quite a bit of immobilization or stiffness of the ankle joint and foot.

Q. Those are the findings which you made on examination?

A. Clinical examination, that is right.

Q. Did you then take X-rays to help form your diagnosis?

A. That is right.

Q. As the result of your physical findings and the
421 X-rays which you yourself took and interpreted, what was your conclusion or tentative diagnosis at the time of this first examination?

A. I felt that there had been quite a bit of muscle tear and ligament tear of the tarsus of the foot and there was some bone injury of the instep.

Q. Doctor, was the nature of the bone injury to the instep such as would result from a trauma of a person stepping on the top of the instep?

A. Yes, I would say so.

Q. And what did you find, Doctor, as to whether or not there was subperiosteal complications?

A. Well, by subperiosteal you mean below the periosteal surface, of course, which would be the bone?

Q. Yes.

A. And that at the time showed a cavity, a depression in the top bone of the instep.

Q. Is that, Doctor, a condition which, in your opinion, resulted from trauma?

A. Yes.

Q. Did you find any arthritic condition in this lady's foot?

A. Yes; there was some arthritic condition.

Q. Was that of the hypertrophic type?

A. Yes.

* * * * *

422 A. I think many of us do and many of us are unaware of it because it does not disturb us, does not bother us.

Q. Is that the kind of arthritis that is known as hypertrophic arthritis?

A. That is right.

Q. Is it necessary, if a person has hypertrophic arthritis, that they have pain?

A. Not necessarily.

Q. Does the fact that a person has a dormant condition of hypertrophic arthritis, which does not produce pain, indicate anything as to how extensive that arthritic condition is?

A. No; it does not unless they complain of a thing, you won't necessarily pick it up.

* * * * *

423 Q. If a person who has a fracture of such a bone and it is in proper position and in a cast, is such a fracture likely to heal quickly?

424 A. It usually will.

Q. State whether or not such a fracture might escape X-ray readings several weeks after the fracture occurred?

A. Yes; they can heal quite rapidly, in four, five or six weeks.

Q. Would such a fracture be observable to a doctor who examined immediately by fluroscopic examination.

A. Yes.

Q. If this lady had a thrombosis in the foot and had not had one prior to that time but dveloped it following this injury, would you give us your opinion, Doctor, as to whether or not the stepping on the instep, that kind of trauma, could produce a thrombosis in the vein of the foot?

A. Very easily.

* * * * *

426 By Mr. Bress:

Q. Is the limitation of motion that you find in her foot one that is subject to her volition or control or is it physically stopped?

A. It is physically stopped. This bone stops it. If you push hard, you can push it and probably crack that.

Q. Will you point to what I have asked you to describe as the navicular bone?

* * * * *

427 Q. Is there any evidence on Mrs. Maske's X-ray of absorption of bone?

A. Yes; in this area (indicating).

Q. What is your opinion as to the relationship between the trauma and that absorption?

A. That is usually what happens with trauma; absorption or overgrowth.

* * * * *

Q. Doctor, does the area of absorption there and the nature of the trauma which was given to you and the history, does it appear from your examination that the injury could have resulted from the stepping of a high heel onto that upper instep?

428 A. Yes.

* * * * *

A. I doubt if she will ever recover from this particular condition. It is a permanent thing because, certainly, she has had enough time in the ensuing two or three years to recover.

* * * * *

429 Q. And you saw the condition in her leg that you saw last Thursday when you examined it and took further X-rays what, can you state to this jury, as to the cause of the disability that this woman has now in having this stiff foot and ankle?

A. I feel that the cause of her disability at this time was due to a traumatic injury to the foot.

430 Q. And will you state, Doctor, if she was having no trouble with her foot and ankle on July 9, 1947, what is your opinion as to whether or not she would have continued to have no trouble if she had not had this trauma?

A. Well, it is hard to say except this: That certainly in maybe 10, 15 or 20 years she might have had some difficulty with this foot, perhaps not that particular bone. On that particular bone, there is very little spur formation and, therefore, her mobility of that ankle would probably have been perfectly all right.

Q. Doctor, is it your opinion that the absorption and the overgrowth of the bone in that area is a result of the trauma sustained on July 9, 1947?

A. Yes; I think so.

Q. Doctor, can you see any improvement in this condition?

A. No.

Q. And are you of the opinion that any surgical steps are necessary?

A. I cannot conceive in my own mind what good, as far as increasing mobility and diminishing pain, would do for this foot or ankle at this time.

Q. If she were your patient, would you operate on her?

A. I think we would leave her alone.

Q. You would leave her alone?

431 A. Yes.

* * * * *

Cross-Examination

By Mr. Roberson:

Q. Doctor, you don't profess to be an orthopedic specialist, do you?

A. I am not an orthopedic specialist in the sense of the word "specialist". I am a general practitioner who has privileges to do orthopedic work, that is, simple reductions and fractures, not open reduction.

Q. But you don't specialize exclusively in the treatment of bone and joint injury, do you?

A. No; that is right.

Q. And Dr. Frank Hand, to whom you referred the plaintiff, does specialize, doesn't he?

A. That is right.

* * * * *

432 Q. Doctor, you didn't see any evidence of any fracture on the X-rays you took, did you?

A. No.

433 Q. Moreover, you didn't see, although you examined the X-rays taken on July 19, 1947, and those taken on July 22, 1947, they indicated no fracture, did they, Doctor?

Mr. Bress: Is there any evidence to show there were X-rays on July 19?

Mr. Roberson: This doctor said he saw them and agreed on the reports.

The Witness: There were no X-ray examinations on the 19th.

By Mr. Roberson:

Q. July 21 and July 22?

A. That is right.

Q. You saw those X-rays?

A. Yes; I have to recall those X-rays. I only saw them once.

Q. You agreed with the report that they showed no fracture?

A. At the time, that is right.

* * * * *

Q. A comparatively recent fracture would show up on an X-ray, wouldn't it?

A. Yes.

Q. In other words, although it is possible after five
434 or six weeks that a fracture would not be detectable by X-ray?

A. That is true.

Q. One would be detectable by X-rays that were taken two weeks after the accident, wouldn't it, sir?

A. May I make one exception?

Q. Will you answer my question?

A. At times in dealing with fractures of the small bones or the bones of the hand or the foot where you have overlapping bones, many times one can miss a fracture of a bone, a hand bone or a foot bone.

Q. Didn't you testify that the navicular bone was the largest bone?

A. It is not the largest. It is a large one. The calcaneus is the largest.

Q. It is possible it would be overlooked?

A. It is possible.

Q. It isn't likely?

A. No, but it is possible.

Q. Did your X-rays reveal any fracture of the navicular bone or any bone?

A. No, it did not.

Q. Your X-rays did not reveal any fracture of the hypertrophic spurs that you referred to, did it?

A. That is right.

Q. As a matter of fact, your X-rays, when you took them in—when was it, December or November of
435 1947?

A. November 22.

Q. They revealed substantially this, didn't they, Doctor; that there were extensive hyperthrophic changes about the right ankle and joint and tarsal bone; that there was a quinus deformity of the foot and considerable deformity of the tarsal bone?

A. Are you quoting my report?

Q. I am asking you if that isn't substantially what you say in your report?

A. No, sir. May I read my report?

Q. No; you may tell me in which yours differs from that.

Mr. Bress: Wait a minute. You are asking him this question: Doesn't your report show so and so and the witness says no, that isn't what it shows, but I can tell you what it shows. He should be permitted to answer the question.

The Court: The witness may answer the question.

The Witness: Repeat the question.

By Mr. Roberson:

Q. Isn't it a fact that your X-rays in November, 1947, revealed substantially this condition—I am not undertaking to quote your report—that there were——

Mr. Bress: I object to this question. It has been
436 stated before and is improper and I don't believe it should be read at this time.

The Court: I see no objection to the question.

Mr. Bress: May I state my objection to the Court at the bench?

The Court: You may state any objection you desire to make.

Mr. Bress: Counsel is obviously reading from the document which is not admissible in evidence and the Court has so ruled. Now, he cannot ask this witness—is this not a fact, trying to give the impression that there is evidence to that effect when the Court has ruled that it is not admissible and that is why I submit that the question is improper. It has been asked once and should not be permitted to be asked twice.

The Court: The objection is overruled.

Mr. Roberson: Will you read the question to the witness, please?

(The following question was read by the reporter:

“Q. They revealed substantially this, didn't they, Doctor; that there were extensive hypertrophic changes about the right ankle and joints and tarsal bone; that there was a quinus deformity of the foot and considerable deformity of the tarsal bone?”)

The Witness: Yes.

* * * * *

438 Q. Doctor, in your testimony, you say that you saw torn muscles and ligaments. They didn't show up on X-rays, do they?

A. No, sir, I didn't say I saw them. I said clinically. That means when you look at your patient's foot you surmise, you can see due to the type of swelling and immobility and the pain, and you know, from experience, that those are muscle tears.

* * * * *

Q. When you saw Mrs. Maske, did you ask her if her right foot—if she had had trouble with her right foot before July 9, 1945?

A. Yes; I did.

Q. What did she say, Doctor?

439 It is a long time ago and I can't just recollect but I can put it this way: That this lady had heretofore walked without the use of a cane or crutches, as I understand it, and when she came to me she was using a cane and later had to go on crutches.

Q. Doctor, tell me what she said in reply to your question as to whether or not she had ever had any arthritis or trouble with her right foot.

A. As I recall, she didn't know she had arthritis and that she had not had considerable difficulty or pain with this right foot.

Q. She indicated negatively to you when you asked her about this right foot?

A. That is right, as I recall.

* * * * *

442 Redirect Examination

By Mr. Bress:

Q. Is that why you say, Doctor, this woman's condition has gotten worse because she was able to flex it in November when you first saw her?

A. That is right.

Q. But she is not able to do it now?

A. That is right.

* * * * *

Q. And by two or three degrees in the forward and downward motion of the foot, would that be within an area of less than an inch?

A. Oh, yes.

Q. Doctor, in the X-rays which you took on November 22, did they definitely show bone absorption?

443 A. That is right.

Q. Did you form an opinion in November of 1947 whether that bone absorption was due to injury or to the hypertrophic condition?

A. I felt it was due to an injury.

Q. Is it your testimony, Doctor, that the condition this woman is suffering from today is a condition resulting from an injury superimposed on an arthritic condition?

A. Yes.

Q. And it is not due to the arthritic condition alone?

A. That is right.

* * * * *

447

Joseph F. Belair

was called as a witness by the defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Roberson:

Q. State your full name, please, Doctor.

A. Joseph F. Belair.

Q. What is your occupation, sir?

A. I am a physician.

Q. What is your address, sir?

A. 1746 K Street, Northwest.

Q. Are you a specialist in any field, Doctor?

A. Yes.

Q. In what field?

A. Radiology.

* * * * *

Q. I show you, Doctor, a paper marked Plaintiff's
448 Exhibit No. 4 and ask you if you recognize that, sir?

A. Yes. This is apparently a copy of a report that
was written while I was there.

Q. Does it indicate that you made some X-rays of Mrs.
Edith O. Maske in July of 1947?

A. It indicates that I interpreted them and wrote the
report as to what they showed.

* * * * *

Q. What did you find as to the original X-rays, the July
21 and July 22, 1947, X-rays?

A. Just as is shown here. The report says:

"Well marked arthritic condition of the ankle and
posterior tarsal joints with some ankylosis."

Q. Specifically, Doctor, did you see any evidence of frac-
ture from trauma at that time?

A. No.

Q. How about on the next day, July 22, 1947? What did
you find on that day?

A. It says:

"There is definite destruction resulting from some
infectious process in the ankle joint."

Q. Some infectious process you would use in distinction to trauma?

449 A. Yes.

Mr. Roberson: No further questions.

Cross-Examination

By Mr. Bress:

Q. Doctor, do you have any independent recollection of this examination or interpretation?

A. No. I go entirely on the record.

Q. You know nothing except what is in that report?

A. No.

Q. You never made any clinical examination of this lady?

A. I may have, but I cannot say at this time that I did.

Q. You don't know to what extent there was any limitation of motion at the time this X-ray was taken?

A. No.

* * * * *

450

Edith O. Maske

was called as a witness in rebuttal and, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Bress:

Q. Mrs. Maske, I have just a group of miscellaneous questions that have been raised that I would like to ask you about.

Now that you have seen on the witness stand here the other day, on Thursday, Mr. J. P. White—answer my question directly without elaborating, if you will, please—have you ever in your life seen that man, Mr. J. P. White?

A. No, sir; I never saw him.

Q. With respect to the matter of approximately the 51 days that you were off, which you took off from your
451 employment during the period January 1, 1947, to

July 8, 1947, was any of that time off attributable to any condition of your right ankle or foot?

A. No, sir.

Q. With respect to a fall which you testified you had in the ladies' room at the Veterans Administration, there was testimony brought out here that in 1946, prior to this accident, you had had a fall due to an accumulation of wax on your heel. Will you tell us whether or not that fall is the fall to which you referred when you testified that your crutches gave way on you when you were a witness before?

A. No, sir; it wasn't.

Q. The fall that you referred to, will you tell us more accurately when that fall occurred, if we didn't ask you that before; the one where your crutches gave way?

A. It was sometime during September, 1949. I did not make a report of it.

Q. Were you injured in that fall?

A. Well, I slipped pretty hard and fell.

Q. Did you take any time off from work on account of it?

A. I think I took two or three days sick leave. I won't say positive but I think I did.

Q. At the time that you were confined at home, as you have testified, following July 9, 1947, did you have a
452 daughter of yours assist you?

A. Yes, I did.

Q. What is that daughter's name and what is her address?

A. Maxine Terrell; Globe, Arizona.

Q. Was she a nurse?

A. Yes, sir.

Q. Did she take care of matters for you while you were laid up during the month of July?

A. Yes, sir. She was called home to take care of me.

Q. Did she come here to Washington to take care of you on account of this injury?

A. Yes, sir; she did.

Q. Can you tell us how soon after July 9 that she was brought to Washington?

A. She arrived on the 11th. She flew in.

Q. Did your daughter have dealings with Dr. Schwartz during the period July 9 and until you returned to work?

A. Yes, sir; she did.

Q. Do you know of your personal knowledge whether or not she ever had any discussion with any investigator who was investigating this accident? Just answer that yes or no, if you know.

* * * * *

453 The Witness: She administered narcotics to me so, if she did, she didn't say. She could have.

* * * * *

454 Q. I show you here Defendant's Exhibit B and ask you whether or not you ever saw the original of that letter?

A. No, I don't remember ever seeing it.

Q. This letter, which is in evidence and which is addressed to you, says:

"Pursuant to our conversation, I am enclosing a medical report to be completed by your doctor."

455 I ask you now, since you said you never saw this man personally, did you ever have any telephone conversation with Mr. White?

A. I could have had a conversation but I just don't remember his name.

Q. But, as far as ever having seen him personally—

A. No, sir, I never did. I did call the office of the Travelers' Insurance—

Q. Just answer the question.

Mr. Roberson: May we approach the bench, your Honor?

The Court: You may.

(Thereupon, counsel approached the bench and the following proceedings were had out of the hearing of the jury:)

Mr. Roberson: Your Honor, I move for a mistrial and the withdrawal of a juror. That was purely voluntary and not in response to anything that was asked. This lady has inserted the words "Travelers' Insurance Company". It is an error that cannot be cured.

Mr. Bress: I tried to drown it out by a question.

Mr. Horning: But you didn't succeed.

Mr. Bress: In a case against a common carrier, even if it does come out unintentionally, as no doubt this started out to be, I think Judge Bailey has ruled, and other judges in this court have ruled that no mistrial would be
456 declared.

Mr. Horning: We had one last week when Judge Schweinhaut withdrew a juror. The Court of Appeals has settled the matter and once the word "insurance" is mentioned, there has got to be a mistrial.

Mr. Bress: There is so much in this case, Your Honor, to convince this jury, from the nature of the testimony of the investigator, et cetera, that there is probably some outside agency investigating the case and, therefore, it could not be prejudicial to the defense.

The Court: The Court is going to overrule the objection and will refuse to grant the request.

* * * * *

459 Mr. Bress: I would like to conclude the plaintiff's rebuttal, if the Court pleases, by offering in evidence one item, that is, the pre-trial reference to the traffic regulations. I offer in evidence Section 22(b), 22(c) and 34.

Mr. Roberson: Of what article?

Mr. Bress: 22(b) relates—

Mr. Roberson: Just tell me what article and I will find it.

Mr. Bress: The section numbers run consecutively; page 19, Mr. Roberson, and page 30.

Does Your Honor have the one in effect amended to April 1, 1947? I will show them to the Court.

460 The Court: What are the numbers?

Mr. Bress: 22(b) and 22(c) and 34.

Mr. Roberson: May we approach the bench?

The Court: You may.

* * * * *

Mr. Bress: Those are the ones that were in effect on the date of the accident.

Mr. Roberson: I have no objection to the first two sections offered which relate to the speed regulations. I think that there is no basis for giving Section 34, which is talking about following too closely. There is no evidence in the case which would justify the giving of that.

Mr. Bress: My case is cast on this one rule, Rule 34.

Mr. Roberson: Your case is cast upon the proposition there was no car there at all at any time.

Mr. Bress: I think the driver's testimony is clearly in violation of that.

The Court: I will permit that to be given.

* * * * *

Mr. Bress: I will read the traffic regulations.

"Section 22. Restriction as to speed.

461 "(b) No person shall drive a vehicle upon a highway at a greater speed than is reasonable and prudent having due regard to the traffic, surface, and width of the highway, and the hazard at intersections, and any other conditions then existing.

"(c) The speed of any vehicle on any street, highway, or bridge in the District of Columbia shall not exceed 25 miles per hour, except as hereinafter specifically provided, or as may otherwise be indicated by official signs; Provided, however, That no vehicle shall be driven on any highway at a speed in excess of that indicated as follows for the particular district, location, or conditions:"

And then it refers to matters not relevant here.

The third regulation is Section 34 on page 30:

"The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and pru-

dent, having due regard to the speed of such vehicle and the traffic upon and condition of the highway.”

The plaintiff rests.

* * * * *

462 Mr. Roberson: Your Honor, at this time I move for a directed verdict for the defendant on the ground that there is no substantial evidence of negligence to submit to the jury.

The pre-trial order indicates that the plaintiff is relying on a negligence case and not a *res ipsa loquitor* case.

It is my position, sir, that there is no evidence of negligence apart from the testimony of the plaintiff herself and that that has been so thoroughly discredited that it amounts to no more than a scintilla of evidence under the Federal rule.

The Court: The Court will overrule the motion and submit the case to the jury.

* * * * *

Mr. Horning: I have kept out of this case so far on the theory that I wanted Mr. Roberson to try it but I am impressed, more or less as an observer, and I would like to state in this connection, with a renewal of the objection, and ask the Court to withdraw a juror and declare a mistrial. I will call this to your attention as to why this case cannot be presented to the jury fairly, which is the defendant's right.

463 In the first instance, over objection, exception and denial of a motion to withdraw a juror, plaintiff succeeded in getting in evidence before this jury that the plaintiff was financially unable to have an operation performed.

Again, over the objection and exception of the defendant, and a motion to withdraw a juror, which was denied, they brought in the mental condition of the husband as a veteran of World War II.

Then again, over objection and exception of the defendant, Mr. Bress, in cross-examination of Mr. White, brought

out that the initials "J. R. B." on one of the exhibits meant J. Reid Bradley. He is a well known representative of Travelers Insurance Company in the City of Washington. Your Honor knows we have on the jury one man who is an insurance man. We have another one who is an insurance agent. We have a third one who is engaged in the insurance business. If there was any doubt in the case when Mr. Bress brought that out, they could identify Travelers Insurance Company from the name of the man.

At the very end of the trial, in order to clinch it so there will be no doubt about it, the plaintiff volunteers and this time mentions the insurance company by name.

I submit with all of that background of financial inability, of ill husband and identification of the local manager of Travelers Insurance Company and now specifically the name Travelers Insurance Company, that it would
464 be most unfair and prejudicial to submit this case to this jury.

It is unfortunate that we had to take the time to try the case but it certainly is not fair, in my opinion, to submit this matter to the jury with all of that background. This is not the case where unexpectedly and suddenly the witness happens to blurt out the mere fact of insurance. This is a case which climaxes and builds up and is the crowning blow so it would be impossible for this defendant to get a fair deal at the hands of this jury as contemplated by the decisions in the Court of Appeals.

For that reason, I would like to renew the motion to withdraw a juror and declare a mistrial.

The Court: The Court will adhere to its original ruling. The motion is denied.

* * * * *
465 The Court: I am refusing all the plaintiff's prayers.

Mr. Bress: On the ground they will be covered by Your Honor's charge?

The Court: Yes, generally. They are not covered in exactly those words but in effect.

The defendant has requested the omnibus charge but I will incorporate that.

* * * * *

466 Mr. Bress: Object to Defendant's No. 1.

The Court: I refuse that.

Mr. Roberson: Are you familiar with that case?

The Court: I am familiar with that case, *Hecht Co. v. Jacobsen*. I do not believe it is applicable.

Mr. Roberson: Your Honor, I specifically object to reference to highest degree of care. I think the Court of Appeals has held otherwise.

The Court: I am going to let them do it again.

Mr. Roberson: Say it again. We say they will have the chance.

The Court: Fine. If they do it again, there will be no ambiguity about it.

All right, gentlemen. I am giving Defendant's Instruction No. 3 without comment that it is the defendant's proffer. In fact, it is now both and all others are refused.

* * * * *

The Court: Yes, I will be glad to tell you. This is what I propose to instruct on. On the defendant's situation:

468 "A common carrier is required by law to exercise the highest degree of care for the safety and protection of its passengers. Failure to exercise the highest degree of care constitutes negligence.

"The highest degree of care means a reasonable care in the superlative degree. In other words, a common carrier is bound to exercise all the care, skill, and foresight within reason practicable under the circumstances.

"It is a rudimentary principle that while a common carrier is not an insurer of the safety of its passengers, it is held to a high degree of care commensurate with the particular hazards involved. However, although a passenger assumes the natural consequences of normal

jerks as a part of the ride in a public conveyance, a sharp, unusual or violent stop is evidence from which a legitimate inference of negligence may be inferred."

That is taken, I might say, from the Ninth Circuit.

"This is only a presumption, however, and casts upon the defendant the duty of showing that such a stop was caused by circumstances beyond the control of the driver while exercising the highest degree of care and caution.

"The defendant must show two things:

469 "(1) That the driver had exercised the required degree of care to avoid a perilous situation, if such situation is shown to have existed. The degree of care required is a high degree; this may be violated through the use of unsafe speed; or failure to keep a proper lookout, or failure to anticipate the act of the driver of the other automobile involved in the perilous situation if such situation is shown to have existed.

"(2) That when confronted with an unexpected crisis, if such is found by the jury to have existed, the driver exercised that degree of care which he was required to exercise as the operator of a common carrier. In this situation, he was not required to exercise the more ordered judgment which he would have been required to exercise under more ordinary circumstances."

Mr. Roberson: Your Honor, I submit that that prayer about a sudden stop casts on the defendant the duty of showing the exercise of due care and is an incorrect instruction as the law is in this jurisdiction. I don't think it has any such duty. All that a sudden stop would do would be to permit an inference of negligence. It would not cast any burden on the defendant to do anything.

Mr. Bress: The burden is on the defendant to go forward with evidence to explain the inference. The burden of proof, however, still remains on the plaintiff. I think
470 that is correct.

The Court: That objection is overruled.

* * * * *

Mr. Bress: I think that gives me a fair guide as to what the Court will tell the jury about the law of the case.

Mr. Roberson: I haven't heard any of the rest of it, Your Honor. I don't know.

The Court: Just the ordinary burden of proof:

"In order for the plaintiff to recover, she must prove that the defendant was negligent, as I have explained negligence to you in this case, and that such negligence was the proximate cause of the accident and that the plaintiff received her injuries as a proximate result thereof.

"Negligence is never presumed but must be proved.

"The mere fact that an accident happened and that the plaintiff received some injury is not sufficient to permit the plaintiff to recover."

I have one on expert opinion.

Mr. Roberson: I am sure that is in conformity with the usual instruction.

* * * * *

475 **Court's Charge to the Jury.**

THE COURT (McLaughlin, J.): Members of the jury: It now becomes my duty to instruct you in the law that applies to this case, and it is your duty to follow the law as I shall state it to you.

At the very outset I should like to impress upon you the fact that the persons who compose the jury are as much a part of the court as the court itself—your work is every bit as important as the work of the judge who presides at the trial.

It is your function, and your responsibility in this case, as in every other case on which you might sit, to resolve the evidence and arrive at what we call the ultimate or final facts; and, in arriving at the final facts apply the law as given you by the Court to those facts, and to do justice between the parties. In that connection, you should weigh

the evidence presented here in open court, of course, without bias, prejudice, or sympathy toward one side or the other.

* * * * *

477 Briefly, the plaintiff states that on or about July 9, 1947, she boarded one of the defendant's buses late in the afternoon and that the bus proceeded on its route, running east on E Street, Northwest; that at or near the intersection of 4th and E Streets, Northwest, the driver of the bus brought the vehicle to a sudden and abrupt stop causing several persons who were standing to lurch forwards;
478 and that one of these standees, in being thrown forward, stepped upon her foot and caused her the injuries of which she complains which resulted in the various items of damages which have been outlined.

The defendant on its part admits that one of its buses was involved in an accident on the date in question, on the line in question. However, it alleges that this incident occurred at a different place than that alleged by the plaintiff, or, in other words, defendant alleges that the accident occurred at a point in the proximity of the middle of the block between 6th and 5th Streets. Defendant alleges that the accident occurred as a result of the fact that a taxi had started to cut across in front of the bus and that because of the recklessness and carelessness in the operation of the taxi the operator of the bus was compelled to apply his brakes in order to avoid a collision.

* * * * *

479 A common carrier is required by law to exercise the highest degree of care for the safety and protection of its passengers. Failure to exercise the highest degree of care constitute negligence.

The highest degree of care means reasonable care in the superlative degree. In other words, a common carrier is bound to exercise all the care, skill, and foresight within reason practicable under the circumstances.

It is a rudimentary principle that while a common carrier is not an insurer of the safety of its passengers, it is held

to a high degree of care commensurate with the particular hazards involved. However, although a passenger assumes the natural consequence of normal jerks as a part of
 480 the ride in a public conveyance, a sharp, unusual or violent stop is evidence from which a legitimate inference of negligence may be inferred. This is only a presumption, however, and casts upon the defendant the duty of showing that such a stop was caused by circumstances beyond the control of the driver while exercising the highest degree of care and caution.

The defendant must show two things:

(1) That the driver had exercised the required degree of care to avoid a perilous situation, if such situation is shown to have existed. The degree of care required is a high degree; this may be violated through the use of unsafe speed; or failure to keep a proper lookout, or failure to anticipate the act of the driver of the other automobile involved in the perilous situation if such situation is shown to have existed.

(2) That when confronted with an unexpected crisis, if such is found by the jury to have existed, the driver exercised that degree of care which he was required to exercise as the operator of a common carrier. In this situation, he was not required to exercise the more ordered judgment which he would have been required to exercise under more ordinary circumstances.

Certain traffic and motor vehicle regulations in effect in the District of Columbia at the time of the accident in question have been read to you.

481 If you should find from the evidence that a party to this action conducted himself in violation of such regulations, you are instructed that such conduct constituted negligence as a matter of law.

However, in this action, a violation of law is of no consequence unless it was a proximate cause of (or contributed in some degree as a proximate cause, to) an injury found by you to have been suffered by the plaintiff.

The burden is upon the plaintiff to prove by a preponderance of the evidence, as that term has been defined for you, that the operator of the bus did not exercise that high degree of care in avoiding a perilous situation, if such is shown to have existed, which is required of a common carrier, or that when the operator was confronted with an unexpected crisis he failed to exercise that degree of care in bringing his bus to a stop which he should have exercised as the operator of a common carrier faced with such a crisis. Further, the burden is upon the plaintiff to prove that any such failure on the part of the operator was the proximate cause of the accident.

* * * * *

Should you find, however, that the plaintiff has failed to so establish any one or more of the foregoing propositions, or should you find that the evidence upon any
482 one or more thereof be evenly balanced, or that it preponderates in favor of the defendant, then the plaintiff cannot recover and, in that event, your verdict should be for the defendant.

In order for the plaintiff to recover, she must prove that the defendant was negligent, as I have explained negligence to you in this case, and that such negligence was the proximate cause of the accident and that the plaintiff received her injuries as a proximate result thereof.

Negligence is never presumed but must be proved.

The mere fact that an accident happened and that the plaintiff received some injury is not sufficient to permit the plaintiff to recover.

* * * * *

485 You are instructed that if the Court has said or done anything which has suggested to you that it is inclined to favor the claims or position of either party, you will not permit yourselves to be influenced by such suggestions.

* * * * *

488 Mr. Roberson: Your Honor, I just wish to renew my objections, on the Hecht Company against Jacobson case, to any instructions on high degree of care.

The Court: Yes. I will not grant that. That is overruled.

Mr. Horning: Your Honor apparently charged on *res ipsa loquitur* when you said, in substance, the jury could infer negligence from the sudden stop. We want to object to that portion of the charge.

The Court: Very well.

Mr. Horning: Our theory, as outlined by Mr. Roberson, being that the charge is specific negligence and not *res ipsa loquitur*.

Then there was one portion of your charge that went so fast I couldn't get it exactly. It said, in substance, that the defendant must show the exercise by him of the highest degree of care. I do not think that is the law, if Your Honor used words to that effect. Our law here is that the plaintiff has the burden of proof and there is no burden upon
489 the defendant and the defendant need not, by affirmative or inference evidence, establish he exercised the highest degree of care and I object to that.

* * * * *

Mr. Horning: I object to that portion of the charge which defined the sudden emergency as being contrary to the law in the District of Columbia in that Your Honor said, despite a sudden emergency, he must exercise the highest degree of care.

* * * * *

490 The Court: I will make no change in the instructions. I overrule all the requests.

* * * * *

491 The Clerk: Mr. Foreman, has the jury agreed upon a verdict?

The Foreman: It has.

The Clerk: Do you find for the plaintiff or the defendant?

The Foreman: The plaintiff.

The Clerk: In what amount?

The Foreman: \$20,000.

The Clerk: Members of the jury, your foreman says your verdict is for the plaintiff in this case in the sum of \$20,000, and that is your verdict, so say you each and all?

(The jury indicated assent.)

* * * * *

III.

EXHIBITS

503

Plaintiff's Exhibit No. 2

Filed Aug. 8, 1950

E. W. SCHWARTZE, M. D.

1225 Talbert St., S. E., Washington 20, D. C.

Phone: Lincoln 6104

Office Hours: 1 - 2 P.M., 6 - 8 P.M.

REPORT OF MRS. EDITH MASKE:

Due to a bus accident on July 9, 1947 Mrs. Edith Maske suffered from the following:

1. Dislocation of the digits of toes of right foot.
2. Pain and swelling of the right foot; an area 4 x 2½" on top of foot.
3. Fracture of navicular bone of right foot.

Treatment:

1. Walking cast was applied.

On July 21, 1947 old cast was removed for X-Ray purposes and new cast was applied. X-Ray examination shows arthritic condition posterior tarsal joints with some ankylosis. X-Ray made by Joseph Belair, MD.

On July 22, 1947 cast was removed due to pain and re-Xrayed. Cast re-applied. X-Ray examination shows no previous change. Cast re-applied. A larger and more comfortable cast. Due to extreme pain, between the dates of July 23, 1947 and July 28, 1947 patient treated for pain and edema. Due to the pain dressed and re-dressed on July 31 and August 2, 1947. Leg swelling continuously; patient unable to stand. Patient treated for pain, swelling and irritation. August 8, 1947 veins larger than before. Area shows a blood green discoloration.

Diagnosis:

Thrombosis of vein of the right leg.

From August 11 through September 11, 1947 patient treated and considerably better.

Bill rendered for professional services \$180.00

Remarks:

Prognosis:

1. Thrombous in the foot may result in emboli formation with serious complications.
2. Poor circulation of the lower extremity may lead to gangrene making the patient a total invalid.

Signed.....

E. W. SCHWARTZE

Note: Compiled from Dr. E. W. Schwartz's records.

Pre-Trial

Exhibit

AH

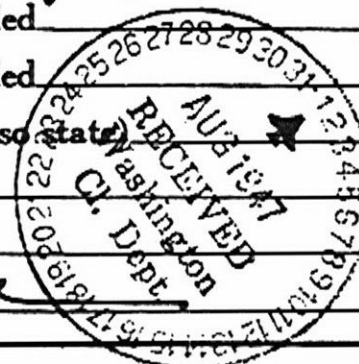
Justice

Def't Ext. No. E

MEDICAL REPORT

White

PATIENT	Name <u>Edith Maske</u> Age <u>60</u> Address <u>6060 Brooks Rd</u> Occupation <u>black Superior</u> Employed by <u>U.S. Govt</u>
HISTORY OF CONDITION	Date of Accident <u>July 9</u> 19 <u>47</u> History as described by patient <u>While a passenger on a Bus (Public Conveyance), the Bus and an auto almost had a collision. Bus stopped suddenly & another passenger stepped on her but the top of the wrist of the right foot</u> Date of your first treatment <u>July 18</u> 19 <u>47</u> Date of your last treatment <u>still continuing</u>
X-RAY	Date taken <u>July 19</u> 19 <u>47</u> Where taken <u>Providence Hosp</u> Findings <u>Negative for fracture</u> <u>no fracture</u> <u>under skin</u>
DIAGNOSIS (Describe and locate character and extent of Injury)	<u>Subperiosteal hematoma & subcutaneous hematoma of dorsum of right foot</u> <u>Pain & inability to stand on the foot</u>
CONTRIBUTING FACTORS	In your opinion, is condition a result of above described accident solely? <u>yes</u>
PROGNOSIS (Include estimate of Total and Partial Disability, and of probable permanent results)	Total disability estimate <u>undetermined</u> weeks <u>In bed</u> days. Ended <u>19</u> Partial disability estimate <u>undetermined</u> weeks days. Ended <u>19</u> Please explain nature and extent of permanent disability. (If none, so state) <u>Estimated cost of medical treatment undetermined</u>

Date July 29 1947Signed E. W. SchwartzAddress 1225 Talbot St. N.E.

BRIEF FOR APPELLANT

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,792

WASHINGTON, MARLBORO & ANNAPOLIS MOTOR LINES, INC.,

Appellant

*For the
District of Columbia Circuit*

v.

EDITH MASKE,

Appellee

FILED OCT 26 1930

Joseph W. Stewart

CLERK

Appeal from the United States District Court for the
District of Columbia.

GEORGE D. HORNING, JR.,
FRANK F. ROBERSON,
Attorneys for Appellant
810 Colorado Building
Washington, D. C.

HOGAN & HARTSON,
Of Counsel.

QUESTIONS PRESENTED.

A. Whether there was sufficient evidence of negligence to go to the jury in a personal injury case where plaintiff's version was uncorroborated and her credibility impeached in many material particulars.

B. Whether there was prejudicial error in:

(1) Plaintiff's disclosure to the jury that Travelers Insurance Company was involved in the defense;

(2) Plaintiff's revelation that her husband was "mentally ill" and that she was "not financially able" to procure medical treatment;

(3) Admission of a "compilation from the records" of a deceased physician under a pretrial order stipulation made when appellant's counsel was unaware of subsequently-discovered facts and failure to permit amendment of the order;

(4) Exclusion of an X-ray report and other impeaching matter from records made in the regular course of a hospital's business;

(5) Admission of a traffic regulation on "following too closely" which had no basis in the evidence;

(6) Charging the jury in a common carrier case in terms of "highest degree of care" instead of "reasonable care" under similar circumstances;

(7) In charging *res ipsa loquitur* where the direct cause of an injury was a fellow-passenger's stepping upon plaintiff's foot;

(8) In charging that evidence of a sudden stop casts upon the defendant the duty of showing the circumstances and absence of negligence on its part.

C. Whether there was an abuse of discretion in failing to grant appellant's motion for judgment notwithstanding the verdict or a new trial in the light of the matters set forth in A and B, *supra*.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,792

WASHINGTON, MARLBORO & ANNAPOLIS MOTOR LINES, INC.,

Appellant

v.

EDITH MASKE,

Appellee

Appeal from the United States District Court for the
District of Columbia.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This appeal is from final judgment in a personal injury action following a jury verdict in favor of the plaintiff. Jurisdiction of this Court to hear the appeal is based upon U. S. CODE (1940) Title 28, Section 1291. The amended complaint, answer thereto, and final judgment of the trial

court appear on Pages 2, 4 and 6-7, respectively, of the joint appendix.

STATEMENT OF CASE.

Appellee, who was plaintiff below, in her amended complaint, sued the appellant, Washington, Marlboro and Annapolis Motor Lines, Inc. for damages for personal injuries claiming that a standing fellow bus passenger was forced against the seated plaintiff by the excessive speed and sudden stopping of defendant's bus at or near the intersection of 4th and E Streets, Northwest. (App. 2-3).¹ On the trial the jury returned a verdict in favor of plaintiff. (App. 6). This appeal is based upon the refusal of the trial court to direct a verdict in favor of the appellant at the close of all the evidence, the occurrence of enumerated prejudicial errors in the course of the trial, and abuse of discretion in the denial of appellant's motion for judgment notwithstanding the verdict or for a new trial.

The accident occurred on July 9, 1947. (App. 15). Sole evidence offered on behalf of appellee as to the alleged negligence was her own testimony. (App. 11). She testified that: the bus was going 30-35 miles per hour (App. 17, 19), crossed 5th Street and came to a violent stop (App. 17) with its front end in the cross-walk (App. 18); a standing passenger was thrown forward by the stop and stepped on the top of appellee's foot (App. 17, 31); the stop was for no apparent reason (App. 18), and although appellee was looking ahead of the bus before, and at the time of, the sudden stop there was no car in front of the bus (App. 34); appellee was treated the night of the accident by Dr. E. W. Schwartz, deceased (App. 20, 21, 39), and had signed a blank piece of paper for him (App. 35), but she had never told him nor anyone that the cause of the sudden stopping was a near collision with a car (App. 35, 43). Appellee's

¹ Appellee's amended complaint charged the fellow-passenger with negligence in failing to secure a proper grip upon the bars provided for the safety of standing and seated passengers. Before trial appellee dismissed her action as to the fellow-passenger. (App. 5).

husband was "mentally ill" (App. 12) and she was "not financially able" at the time of trial to secure medical attention for her remaining foot. (App. 30).

All witnesses, except appellee, including the bus driver and three disinterested bus passengers, testified to the effect that the speed of the bus was reasonable. (App. 124, 49, 56, 62). All saw a taxicab in front of the bus (App. 124, 62, 56, 48). The place of the sudden stop was uniformly placed at a point other than the intersection of 5th and E Streets. (App. 125, 127, 61, 55, 48). The evidence was that the accident happened "very suddenly" (App. 51, 124), and there was no evidence of any following along in tandem of the taxicab and bus prior to the sudden stop (App. 48, 130).

Appellee's uncorroborated testimony was likewise demonstrated to have been false relative to her claim of first having been treated for her alleged injuries by Dr. Schwartz on July 9, 1947 (App. 20, 21, 39; App. 109); her claim of never having had arthritis in the right foot prior to the accident (App. 43, 44; App. 152); her claim that she had never seen J. P. White, an investigator on behalf of appellant (App. 35, 43; App. 68); her testimony that she not only did not write the word "supervisor" on a Medical Report signed by Dr. E. W. Schwartz but had never even seen the paper marked Defendant's Exhibit "E" (App. 41-42, App. 91-98); her claim that she had fallen in a rest room subsequent to the accident (App. 25; App. 66). On the trial the plaintiff, upon being asked by her counsel whether she had ever seen Mr. White, replied that she had not and volunteered as follows:

"I did call the office of the Travelers' Insurance —". (App. 163)

Although counsel for appellee stated that he understood the original records from which a report had been compiled were still in the possession of a deceased doctor's widow, the court over-ruled an objection by appellant's counsel to

the compilation's admission (App. 29) and permission to amend the pretrial order was denied (App. 29).

Testimony of appellant's bus driver that when he saw the taxicab "start to pull out" and "before" the taxi was in front of the bus he applied his brakes (App. 129-130) was undisputed in the evidence; however, the court permitted the introduction into evidence of the traffic regulation on "following too closely" (App. 165).

An X-ray report on appellee's right ankle contained in hospital records received in response to a subpoena which showed that two years before the accident in question plaintiff had extensive hypertrophic changes in the ankle joint and deformity of the foot and ankle bone was excluded from evidence. (App. 142, 145-146, 151). One of appellee's doctors attributed the condition revealed by the said X-ray report to the accident occurring two years later. (App. 151, 154, 156-158). The other of appellee's doctors who testified said that if the condition described existed before the accident, probably trauma had little to do with the condition he found in appellee's foot. (App. 119-120).

Likewise excluded (App. 142) were hospital records which if admitted would have revealed (App. 143, 144, 145) the falsity of plaintiff's claim of a left foot amputation at Walter Reed Hospital in 1945 (App. 11-12, 31-32) and the length of time she had been wearing an artificial limb. (App. 12, 93).

After having had attention specifically called (App. 168, to this Court's opinion in *Hecht Co. v. Jacobsen*, 180 F. 2d 13 (D. C. Cir. Jan. 16, 1950) the trial court charged the jury in terms of the misleading "highest degree of care" (App. 171) rather than the "reasonable care" charge requested in appellant's requested instruction No. 1 (App. 10). Contrary to local law, the jury was instructed that proof of a sudden stop cast upon appellant the duty of showing two things: the stop to have been caused by circumstances beyond the driver's control in the exercise of highest care and that after the crisis he exercised the requisite degree of common carrier care (App. 172).

Appellant's request for a directed verdict at the conclusion of all the evidence was denied (App. 166). Following the verdict in favor of appellee (App. 175), appellant's motion for judgment notwithstanding the verdict or for a new trial was denied. (App. 7, 9-10).

STATUTES AND RULES INVOLVED.

1. The pertinent part of the so-called Federal Shop Book Rule Statute, under which appellant contends certain portions of Walter Reed Hospital records should have been admitted, is contained in Act of June 20, 1936, c. 640 § 1, 49 Stat. 1561, 28 U. S. C. § 695, as amended by Act of May 24, 1949, c. 139 § 92 (a), 63 Stat. 103, 28 U. S. C. A. § 1732 reading as follows:

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business" as used in this section, includes business, profession, occupation, and calling of every kind.

2. Federal Rule of Civil Procedure 16 on the effect of a pre-trial order, under which appellant contended it was entitled to a modification, provides in pertinent part as follows (emphasis added):

The Court shall make an order which recites the action taken by the conference, the amendments allowed

to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, *unless modified at the trial to prevent manifest injustice.*

3. The disputed traffic regulation on "Following Too Closely," which was admitted, appears in *Traffic and Motor Vehicle Regulations for the District of Columbia* (as amended to April 1, 1947), Section 34:

The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard to the speed of such vehicle and the traffic upon and condition of the highway.

STATEMENT OF POINTS.

1. The court erred in failing to grant appellant's motion for a directed verdict at the close of all the evidence and in denying the motion for judgment notwithstanding the verdict.

2. The court erred in failing to declare a mistrial following each and all of these errors: the injection into the case of insurance, a "mentally ill" husband and financial inability to secure medical treatment.

3. The court erred in admitting into evidence plaintiff's Exhibit No. 2, said to be a compilation from the records of a deceased doctor, and in denying appellant's motion to amend the pretrial order.

4. The court erred in excluding from evidence the Hospital records including an X-ray report from Walter Reed Hospital.

5. The court erred in admitting into evidence *D. C. Traffic and Motor Vehicle Regulations*, Section 34, dealing with "following too closely".

6. The court erred in charging the jury: (a) in terms of "highest degree of care", (b) the substance of the doctrine of *res ipsa loquitur*, (c) that evidence of a sudden stop cast on appellant the duty of exculpation.

7. The court abused its discretion in failing to grant appellant's motion for a new trial upon the grounds of (a) the weight of the evidence in appellant's favor and (b) the prejudicial errors on the trial listed in points 2-6 *supra*.

SUMMARY OF ARGUMENT.

A. Two versions of the accident were: (1) that of appellee, totally unsupported by other testimony, that appellant's bus, travelling eastward at 30-35 miles per hour suddenly was stopped for no reason after the front crossed 5th Street Northwest; and (2) that of appellant, supported by its bus driver and the three disinterested bus passengers, that the bus, while travelling at a reasonable speed between 6th and 5th Streets was forced to stop suddenly in this block to avoid an accident when a taxicab cut in front of it from the right. Appellee's theory was not established by her own testimony, and so discredited was she on material matters, including the fact that at one time she had herself told her physician that her injuries had been received when a "bus and an auto almost had a collision", that reasonable men could not have accepted as true her uncorroborated testimony on the issues of negligence when opposed by all the other evidence. At most, her discredited testimony amounted to a "mere scintilla" which did not entitle her to go to the jury.

B. 1. Injection of insurance into the case necessitated the "forthwith" declaration of a mistrial in order to avoid its prejudicial effect. *Radinsky v. Ellis*, 83 U. S. App. D. C. 172, 167 F. 2d 745 (1948). The cumulative effect of insurance plus appeals to sympathy by the ringing in of appellee's mentally ill husband and financial inability to procure medical treatment rendered a fair trial impossible.

2. (a). Admission into evidence of a so-called compilation from the records of a deceased physician by virtue of a pretrial order was error in view of the fact that appellant's counsel ascertained only on the eve of trial that the original records were available and that the "E. W. Schwartz" for whose signature at the end of the "compilation" made on the physician's letterhead a space was provided, was the son rather than the doctor. In view of the surprise involved and the fact that the widow had available original records, the court should have modified the pretrial order to exclude the so-called compilation which contained inadmissible and damaging prognoses not in fact compiled from the doctor's records.

(b) The portions of the Walter Reed Hospital records offered in evidence by appellant should have been admitted under the Federal Shop Book Rule statute. Some parts of the records squarely contradicted the testimony of appellee and hence her credibility. Particularly prejudicial was exclusion of an X-ray report establishing that a right foot condition existed two years before the accident which condition one of appellee's doctors admitted was substantially the same as that shown in X-rays taken by him some four months after the accident and the other of whose doctors stated if the condition described in the X-ray report existed before the accident, then trauma probably had little to do with the infirmities observed by him. The X-ray report in question dealt with readily recognizable facts as to the foot about which competent men would not differ. Accordingly, the X-ray report was clearly admissible under the shop book rule. *New York Life Insurance Co. v. Taylor*, 79 U. S. App. D. C. 66, 147 F. 2d 297 (1945).

(c) Admission of a traffic regulation on "following too closely" was prejudicial error because there was no evidence of any proceeding in tandem of taxicab and bus upon which to predicate negligence in this particular.

3. The charge to the jury contained much prejudicial error. First, in the face of the plain direction by this Court,

in *Hecht Co. v. Jacobsen*, 180 F. 2d 13 (D. C. Cir. Jan. 16, 1950) that "reasonable care" is the desirable formula for use in instructing a jury, the trial court instructed in terms of the expressly disapproved "highest degree of care" formula. Secondly, the trial court charged in effect on a *res ipsa loquitur* theory of liability although the case involved a possibly negligent fellow-passenger whose actions were within the realm of appellee's observation and knowledge. Thirdly, the trial court shifted the burden of proof in instructing in effect that proof of a sudden stop cast on appellant the duty of clearing itself of negligence. The law in the District of Columbia certainly is, even in a *res ipsa loquitur* case, that a defendant need not do anything "to countervail the inference". *Underwood v. Capital Transit Co.*, 183 F. 2d 822 (D. C. Cir. May 29, 1950).

C. The minimum post-trial relief to which appellant was entitled in view of (1) the greater weight of the evidence, and (2) the many prejudicial errors in the course of the trial was a new trial in order that appellant might have a fair and impartial trial upon proper evidence before a correctly instructed jury uninfluenced by such extraneous considerations as insurance, relative financial status, and personal misfortune of the appellee.

ARGUMENT.

A. Since reasonable men could not have differed that upon the whole evidence there was no negligence upon appellant's part, a verdict should have been directed in its favor.²

The amended complaint charged to appellant negligence in two particulars: (a) operating its vehicle "in excess of the speed allowed by the traffic laws" and (b) in causing its vehicle "to come to a sudden and abrupt stop". (App. 3).

² What is set forth in this section of the brief deals with the insufficiency of the evidence for submission of the issue of negligence to the jury. Therefore, what is contained herein supports *a fortiori* appellant's contention that the verdict was against the weight of the evidence and that the court abused its discretion in failing to grant appellant's motion for a new trial.

Only the "sudden stop" was asserted at pretrial, and it was clear from the pretrial order's statement "plaintiff claims that the bus driver was negligent" that this specific negligence rather than a theory of *res ipsa loquitur* was to control the case (App. 5, 6). At no time in the course of the trial was permission sought by appellee to amend the pleadings or pretrial order to assert other or additional theories. Accordingly, the inquiry is whether there was substantial evidence establishing the negligence charged. It would hardly seem necessary to emphasize that the evidence must be "substantial", and that "a mere scintilla of evidence" is not deemed sufficient to raise a question upon which reasonable men might differ. *Jackson v. Capital Transit Co.*, 69 App. D. C. 147, 99 F. 2d 380 (1938); *Kresge Co. v. Kenney*, 66 App. D. C. 274, 86 F. 2d 651 (1936).

The claim of speed was abandoned in the framing of issues at pretrial and its revival as an issue, if at all, must be found in appellee's testimony at the trial that the bus was going "between 30 and 35 miles an hour" between 7th and 6th Streets, that after crossing over 6th Street "he speeded up again", came to 5th Street, "crossed it and it came to a complete stop, a violent stop". (App. 17). Obviously this testimony merely is evidence that the bus was proceeding rapidly in the blocks between intersections and after crossing 6th Street he "speeded up again". (App. 17). Since the stop occurred, according to appellee, before the rear end of the bus had cleared the intersection at 5th and E (App. 18), appellee's testimony cannot be said to be evidence that *in crossing the 5th Street intersection* there was excessive speed. In fact, her testimony as to a sudden stop negated speed as it is a matter of common knowledge of which judicial notice should be taken that rapidly moving vehicles as heavy as buses cannot be suddenly stopped without momentum resulting in skidding of tires and substantial forward movement after application of the brakes. Not a line of evidence in the record contains these telltale indicia of speed. On the contrary, the only evidence on the

point was the bus driver's undisputed testimony that upon seeing the taxi start up from the right hand curb, he stopped the bus within "approximately four feet", (App. 129-130, 134).

The entire testimony upon the question of the bus speed immediately prior to the sudden stop was that of the bus driver and the three disinterested lady passengers. He testified that his speed was "approximately 10 to 12 miles an hour" (App. 124, 134). Mrs. Gladys Page, asked about excessive speed, did not "believe he was speeding", and characterized the speed as "normal". (App. 49). Mrs. J. G. Augusti said of the bus: "It wasn't going very fast. It was going a moderate rate of speed. It wasn't going fast." (App. 56). Mrs. Mary Calder when asked about speed immediately prior to the sudden stop replied: "a moderate rate of speed". (App. 62, 65). "Moderate" to this witness meant "15 to 18 miles." (App. 65).

Elimination of the issue of speed leaves only the bare assertion of a "sudden stop" as the negligence charged against appellant in the amended complaint. Appellant consistently in its answer (App. 4), at the pretrial (App. 5) and throughout the trial admitted, and proved through the bus driver and disinterested passengers (App. 124, 61, 56, 48) that the bus made a sudden stop to avoid a collision. Bare proof of an injury following a sudden stop, without more, would no more entitle appellee to have the jury speculate as to whether there was a *negligent* sudden stop, than would a common carrier passenger's mere claim of a fall in leaving a vehicle [*Brown v. Capital Transit Co.*, 75 U. S. App. D. C. 337, 127 F. 2d 329 (1942) (directed verdict)], or that there was a "sudden start", [*Connor v. Washington Ry. & E. Co.*, 43 App. D. C. 329 (1915) (demurrer)].

The reason for the sudden stop was so apparent from the evidence that no reasonable man could fail to accept the true facts. As the bus driver said, a taxicab suddenly started from the parked car lane at the curb into the lane of traffic in which the bus was proceeding and stopped so

that the bus driver "jammed on the brakes". (App. 124). Again the three disinterested lady passengers corroborated the bus driver. Mrs. Page said "just as the bus had gotten into full motion, why a taxi cut in from the right in front of the bus and the bus had to come to a sudden stop and threw all of us." (App. 48). At the time of the sudden stop, Mrs. Augusti "looked to see and it was a taxicab in front of the bus", (App. 56) and Mrs. Calder testified to like effect. (App. 61, 62).

Appellee alone, according to her testimony at the trial, failed to see any reason for the bus to stop, (App. 18) and testified to the effect that she was looking ahead before the accident and "didn't see a car there" (App. 34) and that although looking ahead at the time of the sudden stop "there was no car there then" (App. 34). Of course, the overwhelming proof that there was a vehicle present to be seen "produces the inevitable conclusion that she must have seen" what was there to be seen "if she actually looked in its direction". *Landfair v. Capital Transit Co.*, 83 U. S. App. D. C. 60, 61, 165 F. 2d 255, 256 (1948). Moreover, in this connection it is not without significance that in the Medical Report of Appellee's physician, Dr. E. W. Schwartz, appears the following (App. 109, 179):

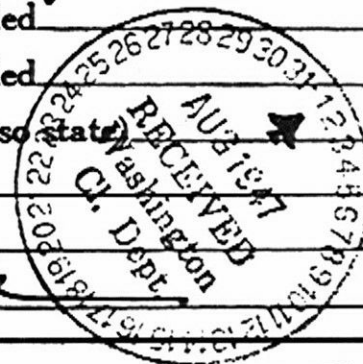
"History described by patient: While a passenger on a bus, public conveyance, bus and an auto almost had a collision."

Viewing the matter in the most charitable light possible toward appellee, her testimony on the absence of a valid reason for the sudden stop is "of no value", as she evidently failed to remember the true facts at the time of the trial. Cf. footnote 2 in *Capital Transit Co. v. Grimes*, 82 U. S. App. D. C. 393, 394, 164 F. 2d 718, 719 (1947).

Likewise demonstrating the impossibility of any reasonable man accepting appellee's testimony are the numerous material particulars in which she was shown to have testified falsely. Among instances of this were her claim: of never having had arthritis in her right foot prior to the ac-

Def't Ext. No. E-3Wm & H MEDICAL REPORTWhite

PATIENT	Name <u>Edith Maske</u> Age _____ Address <u>6060 Brooks Rd</u> Occupation <u>black Superior</u> Employed by <u>U.S. Govt</u>
HISTORY OF CONDITION	Date of Accident <u>July 9</u> 19 <u>47</u> History as described by patient <u>While a passenger on a Bus (Public Conveyance), the Bus and an auto almost had a collision. Bus stopped suddenly & another passenger stepped on to the top of the w step of the right foot</u> Date of your first treatment <u>July 18</u> 19 <u>47</u> . . Date of your last treatment <u>still continuing</u>
X-RAY	Date taken <u>July 19</u> 19 <u>47</u> Where taken <u>Providence Hosp</u> Findings <u>Negative for fracture</u> <u>under skin</u>
DIAGNOSIS (Describe and locate character and extent of injury)	<u>Subperiosteal hematoma & subcutaneous hematoma of dorsum of right foot</u> <u>Pain & inability to stand on this foot</u>
CONTRIBUTING FACTORS	In your opinion, is condition a result of above described accident solely? <u>yes</u>
PROGNOSIS (Include estimate of Total and Partial Disability, and of probable permanent results)	Total disability estimate <u>undetermined</u> weeks _____ days. Ended <u>In bed</u> 19____ Partial disability estimate _____ weeks _____ days. Ended _____ 19____ Please explain nature and extent of permanent disability. (If none, so state) _____ Estimated cost of medical treatment <u>undetermined</u>

Date July 29 1947Signed H W SchwartzAddress 1225 Talbot St. N.E.

cident (App. 43, 44), disproved by her own doctor (App. 152); of being treated by Dr. E. W. Schwartz on the very night of the accident (App. 20, 21, 39), disproved by a signed report of Dr. E. W. Schwartz (App. 109) on which appellee made only one change in order to characterize herself as a "supervisor" (App. 109); of neither having made this change nor having seen Dr. Schwartz's medical report (Defendant's Exhibit E) (App. 41, 97-98); of having sustained a rest room fall after the accident (App. 25), when the work records showed it occurred over a year before the accident (App. 66).

The supreme example of the worthlessness of appellee's uncorroborated testimony was the crushing effect of her own Dr. E. W. Schwartz's signed report (Defendant's Exhibit E). Appellee's counsel fought long and vigorously to keep the sight of this document from the jury. (R. 269-316) It is present in original form in the record on appeal (R. 535), and is reproduced here in lithograph form and inserted opposite this page for the benefit of this Court:

Even a casual and untutored glance reveals that the word "clerk" on the third line has been lined out and in a different handwriting the word "supervisor" substituted as the description of the patient's occupation. That this was done in handwriting other than that of Dr. Schwartz was established by his widow (App. 91) and is readily apparent to the layman's eye. The identity of the person who changed the word was Edith Maske, appellee. This was the unequivocal opinion of a highly qualified handwriting expert (App. 98). The matter is concluded when the appellee's peculiar pride in her "supervisor" title and consistent use of the word is recalled from her pretrial deposition (App. 111) and her testimony at the trial. (App. 11)

The Medical Report demonstrates that appellee's uncorroborated testimony is without value because it shows conclusively to all reasonable men that she unhesitatingly testified falsely when it was in her interest to do so in testifying under oath:

- (1) that she never saw the Report (App. 41);
- (2) that the word "supervisor" was not in her handwriting (App. 42) (who else would trouble to make such a change?);
- (3) that she had never told anyone, particularly Dr. Schwartz, that the bus and auto almost had a collision (App. 35, 43);
- (4) that she was first treated by Dr. Schwartz on July 9, 1947, the date of the accident (App. 20, 21, 39), instead of on July 18, 1947 [the day after Mr. J. P. White said he called on her to investigate the accident (App. 68)]

In all earnestness it is urged that to permit the unsupported claim of this appellee to go to a jury on the issue of negligence was a travesty which it is the duty of this Court to correct. A \$20,000 reward to appellee for having the temerity to testify as she did can hardly fail to do violence to our concepts of justice. It is respectfully submitted that because any verdict would have been against the evidence a directed verdict should have been granted, the motion notwithstanding should have been granted, and the minimum relief to which appellant was entitled was a new trial.

B. Multiple prejudicial error was committed on the trial.³

1. (a) *Identification to the jury of "Travelers Insurance" was prejudice which should have resulted in a mistrial.*

The most certain and obvious prejudicial error on the trial was failure to declare a mistrial when, whether calculatedly or inadvertently, insurance was brought into the case by the appellee. Attorneys familiar with negligence

³ The trial errors may be grouped into these categories: (1) creation of bias or sympathy, (2) admission and exclusion of evidence, (3) improper charge to the jury. The argument section of the brief will deal with them in these classifications.

litigation universally acknowledge the futility of expecting fair and impartial consideration of a case once the jury is apprised that not the defendant, but some insurer, will bear the cost of any award to an injured plaintiff. Experience as to the *inevitability* of such prejudice has long established the rule in the District of Columbia, whatever may be the rule elsewhere, that when insurance comes out, the only thing to do is to withdraw a juror and start over with an uninfluenced panel. The reason for the rule is the simple recognition that jurors, being human in their frailties, cannot give the requisite fair and impartial consideration to the evidence when they weigh the pains and hardships related by personally present individuals like themselves against a pecuniary exaction from some large and presumably wealthy corporation which has received premiums for the purpose of bearing defendants' liabilities.

Because the prejudice is present irrespective of motive, it matters not whether the injection of insurance was inadvertent, as appellee's counsel insists, or calculated as one would have reason to believe by reason of several occurrences at the trial. First, when Mr. J. P. White, a lawyer who was an ex-investigator for Travelers Insurance Company, testified that he had investigated on behalf of the defense, appellee's counsel asked (App. 70):

"Who was your employer, on whose behalf you made that investigation at that time?",

and recognizing the danger of a mistrial under local practice from such a question, added:

"Don't answer the question until the Court has ruled".

The Court properly ruled out the question as it had been made clear to the jury that Mr. White's investigation was on behalf of the defense of the action (App. 71, 72). Nevertheless, appellee's counsel thereafter indirectly returned to the same line of inquiry by inquiring of Mr. White the identity of "J.R.B." whose initials appeared on the office file

being used by Mr. White. (App. 82). The initials stood for J. Reid Bradley whom counsel for appellee well knew from years of negotiations with him to be the widely-known Washington claims representative of the Travelers Insurance Company. Upon the mention of Mr. Bradley's name, appellee's counsel demonstrated this knowledge, and informed the jury of Mr. Bradley's connection with Mr. White by volunteering in open court (App. 82):

"A fellow employee."

When it is recalled that on the *voir dire* one of the jurors selected was shown to have been a Workmen's Compensation claimant (R. 493-N), the possibility inherent in bringing out Mr. Bradley's identity as indirectly informing one or more of the jurors of an insurance company's interest in the case is obvious.

However, any doubt by such indirect suggestion was removed by appellee's direct naming of the company in her rebuttal testimony when the following colloquy between appellee and her counsel took place (App. 163):

"I ask you now, since you said you never saw this man personally, did you ever have any telephone conversation with Mr. White?"

"I could have had a conversation, but I just don't remember his name."

"But, as far as ever having seen him personally . . ."

"No, Sir, I never did. I did call the office of the *Travelers Insurance* —" (emphasis added)

Here, then, was the plain identification of the company involved. In view of the undoubted infirmities from which appellee suffered, her unfortunate loss of her left foot in an accident years before, the cumulative effect of her unhappy lot in having a "mentally ill" husband (App. 12) and in not being "financially able" at the time of trial to secure medical treatment for her remaining foot (App. 30) the naming of an insurer rendered *absolutely certain* the fact that the jury would attempt to endow the appellee with a

sum to make her future easier. The rule against impeaching a verdict by taking affidavits from individual jurors prevents appellant from demonstrating through the jurors themselves the prejudicial effect of the insurance. However, it would be unrealistic in the extreme for courts to ignore what is universally known among trial lawyers and judges to be the prejudicial effect in jury cases of the mention of insurance.

In the District of Columbia there is no question of what the decisions of this Court and the practice in the District Court have established to be the rule. No plainer statement of it could be made than that by this Court in *Radinsky v. Ellis*, 83 U. S. App. D. C. 172, 173, 167 F. 2d 745, 746 (1948):

“* * * the plaintiff also stated to the jury, in his counsel's opening remarks, he expected to prove that defendant had public liability insurance which would protect him from personally paying any damages awarded to the plaintiff. Apparently he reasoned that the fact such insurance was carried demonstrated the existence of the liability asserted. In a case such as this, *when the existence of insurance protection in favor of the defendant is shown to the jury, a mistrial should be declared forthwith.*” (Emphasis added)

This strong language marked no innovation. A long series of appellate and trial court decisions in this jurisdiction have recognized the prejudicial nature of the insurance factor. Thus, in *Behrman v. Sims*, 81 U. S. App. D. C. 303, 157 F. 2d 862 (1946) the principle was accepted as a matter of course and the only question was whether the *voir dire* question there involved suggested insurance to the jury, the court saying, at 304, 863:

“This voluntary statement from a juror that he had bought insurance from a representative of a life insurance company was not enough, in our view, to suggest to the jurors the idea that a liability insurance company protected Behrman.”

In *Hertz v. Hudson Motor Car Co. & Travelers Insurance Co.*, 8 F. R. D. 431 (District Court, D. C. 1939) Judge Cox in sustaining motion of insurer to dismiss the complaint as to the insurer said:

“To permit the plaintiff to show that the defendant is protected by liability insurance is held to be reversible error in the trial of a cause such as this.”

In *Hoagland v. Chestnut Farms Dairy*, 63 App. D. C. 357, 72 F. 2d 729 (1934), an auto accident case, refusal of plaintiff's request that on *voir dire* he be permitted to ask whether any were in insurance business, was *held* approved, the court saying at 359, 731:

“* * * the question is open to objection because it indirectly suggests to the jury that the case is actually being defended by an insurance company, and that the nominal defendants would not be affected by their verdict.”

In *Brooke v. Croson*, 61 App. D. C. 159, 58 F. 2d 885 (1932), judgment for plaintiff was *reversed* where plaintiff testified that defendant had told him he was fully insured. The court said, at 160, 161, 886, 887:

“It is established by the overwhelming weight of authority that as a general rule it is reversible error in the trial of an action for damages for personal injuries suffered in an automobile accident to permit the plaintiff to introduce evidence to show that the defendant is protected by liability insurance against such accidents. It is held that such evidence is not relevant to the issue of negligence, and can have no effect but to induce a verdict based on the fact that an insurance company, and not the defendant, must pay the award.
* * *

* * * * *

“In this jurisdiction the subject is concluded by *Capital Construction Co. v. Holtzman*, 27 App. D. C. 125, which was an action for damages for personal injuries resulting from an elevator accident. It was held by this

court to be reversible error for the trial court to permit plaintiff's counsel to ask witnesses whether or not the defendant was insured against such accidents."

In *Capital Construction Co. v. Holtzman*, 27 App. D. C. 125 (1906) injection of insurance resulted in reversal, the cumulative effect being specifically mentioned, at 132:

"We think it was error to permit the witness Stokes to be questioned as to the defendant being protected by an insurance company, and that, as the question was wholly incompetent, even if the jury had been told to disregard the testimony, and it had been stricken from the record, the error would not have been cured. We have no doubt that, it, taken in connection with the other proceedings complained of, might and probably did influence the jury in fixing the amount of damages."

Judge Kirkland, in *Shotwell v. Stephens*, Civil Action No. 4869—47, February 24, 1950, declared he was "compelled" to declare a mistrial when the plaintiff inadvertently mentioned insurance in answering one of Mr. Horning's questions during the following cross-examination:

"Q. You made a complaint, didn't you, to the Beal Motor Co.?"

A. Yes Sir.

Q. You didn't in that complaint attribute anything to the mark?

A. Mr. Friedman asked me to make a little statement for the Insurance Company.

Mr. Horning: Your Honor, I ask for the withdrawal of a juror.

Mr. Nordlinger: This question is whether or not he made a complaint.

The Court: The vice of the answer is, of course, that he stated he made a statement for the insurance company, and I am compelled, under our system, to withdraw a juror. I regret it, but by direction of the Court, the Deputy Clerk will withdraw a juror and the Court declares a mistrial."

Other local cases in which mention of insurance has precipitated withdrawal of a juror are too numerous to enumerate. Among them, however, of which counsel for appellant has learned from directly contacting one or more of the counsel involved, are the following:

Webber v. Sutton & American Cab Co., C.A. 4347—49, Harry Welch, Esq., for defendant, mention of insurance caused Judge Bailey to declare a mistrial on March 18, 1950. Upon a retrial, Judge Pine on May 11, 1950, took the same action in the same situation.

Smithson & Cumming v. Markowitz & Bell Cab Co., C.A. 4264—47, Richard Galihier, Esq., for defendant, Judge Bailey declared the mistrial on May 2, 1949.

In *Childress v. Stewart*, C.A. 3270—47, Charles Collins, Esq. for defendant, the plaintiff was asked by his counsel if the defendant had appeared at the corporation counsel hearing. Upon his reply in substance "yes, accompanied by the insurance lawyer," Judge Bailey forthwith withdrew a juror in November, 1949.

In *Carpenter v. McBride*, C.A. 35322, Cornelius Daugherty, Esq., for defendant, the plaintiff upon interrogation by his counsel as to whether anything else had happened, replied in substance: "yes, the defendant said he would report it to his insurance company." Judge Pine, thereupon on January 22, 1947, withdrew a juror.

It is respectfully submitted that there can be no question that under the circumstances of the case at bar, a mistrial upon the insurance ground alone, even if there were no other error in the case, should have been granted.

1 (b) *It was prejudicial error for the appellee to inform the jury that her husband was "mentally ill."*

Her counsel had not been questioning her five minutes at the start of the case when this prejudicial, because inevitably sympathy arousing, response was made to appellee's counsel's question concerning whether she attended her work with some degree of regularity before the accident. (App. 12):

“A. I lost some work but it was not due to my physical condition. It was due to my husband who was mentally ill * * *.”

Motion for a mistrial was denied. (App. 13). Although the court sought to minimize the effect by telling the jury that they should disregard the feature, it is respectfully submitted that human nature being what it is, the view that sympathy could thus be kept out of the jury verdict would be to ignore reality.

1 (c) *It was prejudicial error for the appellee to inform the jury that she was “not financially able” to procure medical treatment for her ankle.*

The prejudicial creation of sympathy for the appellee was apparent from the following. Her counsel first had her demonstrate to the jury a professed inability to move her remaining foot as much as an inch (App. 30). He then asked (App. 30):

“Q. Has that limitation of motion improved at all during the last year or two?

A. No Sir, it has decreased.

Q. Are you getting any treatment now for it?

A. No, Sir, *I am not financially able.*”

A better calculated means for an amputee to generate sympathy could not be conceived than to inform the jury that she was without funds to secure treatment for the remaining foot. Thereafter, it would be an unusual jury, indeed, which would ignore the recollection of this inadmissible testimony and decide the case without sympathy and emotional considerations. Nevertheless, the court again overruled appellant's objection to the evidence (App. 31).

Any one of the three preceding grounds would have justified the granting of a mistrial. Their cumulative effect was insuperable and required that a mistrial be granted and later that a new trial should be had so that the appellant could have an impartial trial upon the basis of the evidence rather than the emotions. Appellee obviously had an unlucky life. The bringing out and emphasizing of her

prior misfortune, her metnally ill husband, her financial inability to procure treatment for her remaining foot, crowned by the gratuitous information that Travelers Insurance Company was the interested party made the result certain. Only this Court can now see to it that evidence, rather than emotion, should control the ultimate outcome.

2 (a) *Admission into evidence of the compilation from the records of a deceased physician and denial of appellant's motion to amend the pretrial order to prevent manifest injustice was prejudicial error.*

Over appellant's objection (App. 26), there was read to the jury a so-called compilation from the records of the deceased physician, Dr. E. W. Schwartz.⁴ Appellant's counsel informed the court that he had ascertained only the day before trial that the E. W. Schwartz for whose signature a space was provided on the report made on the doctor's letterhead, was not the doctor but his son. (App. 26). Appellee's trial counsel was advised by his associate counsel that the original records were still in the possession of the doctor's widow (App. 29). Nevertheless, the court overruled appellant's objection (App. 29), despite the request that the pretrial order be amended (App. 29). The report (App. 176-177), including the following inflammatory and uninformed speculation, was read to the jury (App. 30):

“Remarks:

Prognosis:

1. Thrombous in the foot may result in emboli formation with serious complications.
2. Poor circulation of the lower extremity may lead to gangrene making the patient a total invalid.

Signed
E. W. SCHWARTZE”

⁴ The original exhibit appears in the record on appeal for the Court's examination (R. 535). The compiler was not identified as anyone other than the same E. W. Schwartz of whose records the report purported to be a summary.

No argument is required to establish the highly prejudicial effect of such a prognosis, purportedly that of Dr. E. W. Schwartz, but in fact the lay speculation of a boy. Rule 16 as to modification of the pretrial order to avoid injustice was the obvious solution since appellee's counsel had access to the original records which would not have thus misled the jury.

2 (b) *Exclusion of the Walter Reed Hospital Records and X-ray report was prejudicial error.*

The Federal Shop Book Rule was twice considered and authoritatively analyzed with respect to Walter Reed Hospital records in the leading case of *New York Life Insurance Co. v. Taylor*, 79 U. S. App. D. C. 66, 147 F. 2d 297 (1944, 1945). The majority opinion there stated, at 72, 303:

"Hospital records are no different from any other kind of records kept in the regular course of business. They must be subjected to the same tests as to subject matter. Regularly recorded facts as to the patient's *condition* or treatment *on which the observations of competent physicians would not differ* are of the same character as records of sales or payrolls. Thus, a routine examination of a patient on admission to a hospital stating that he had no external injuries is admissible (citing also in the note a case where the record stated the patient had "a fractured right clavicle"). An observation that there was a deviation of the nasal septum is admissible (citing also in the note cases of laboratory records giving analysis of food, the eating of which made patient ill, and a case involving laboratory tests and history sheets)". [Matter in parentheses is paraphrased and emphasis is added.]

As applied to the case at bar, the pertinency of the foregoing analysis of the admissibility of hospital records is apparent. Appellant sought to introduce portions of the Walter Reed records (a) to attack the appellee's credibility and (b) to show that the right ankle condition seen and testified to by her Doctors Hand and Frohman were the

same as had been observed on a routine right ankle X-ray at Walter Reed Hospital on July 19, 1945, almost exactly two years prior to her bus accident.

The appellee testified with dramatic effect upon her direct examination (App. 11, 12) that the amputation of her left leg was incurred at Walter Reed Hospital in 1945, and that prior to the trial she had worn an artificial lower limb for five years (App. 11):

“Q. Can you just tell us why it was amputated, if you know?

A. I had an injury from a gas explosion in 1929 and I neglected to have anything done to it. While my husband was overseas, I was asked by the Personnel Office of the General Accounting Office to go to Walter Reed and see if there couldn't be something done for me. I went there and came out an amputation; one on June 6 and another one on the same leg in August, 1945.”

The foregoing sympathy provoking testimony, according to the routine records of Walter Reed proffered by appellant, was almost entirely false. Had they been admitted they would have shown that Mrs. Maske went on 14 May 1945 to the Orthopedic Clinic for consultation (App. 143) because of opinion regarding an old amputation, that “this lady had an amputation of the left leg below the knee performed 16 years ago * * * This stump should be revised to get rid of the redundant tissue.” The pertinent history from the clinical record would have revealed (App. 144) that she:

“wants leg fixed before she invests in new prosthesis.”

The June, 1945, clinical record would have revealed as to history, complaint and condition on admission (App. 144):

“Suffered traumatic amputation of left lower leg in R.R. accident approximately 15-20 years ago.

“Chief complaint at present is inability to wear artificial limb due to poor amputation stump.”

The effect of the foregoing routine entries upon the appellee's credibility is obvious. All are admissions, a recognized exception to the hearsay rule in that they are directly contrary to her statements in court.

However, far more damaging to the appellant than exclusion of the foregoing portions of the Walter Reed records was the exclusion of the Radiologic Record which would have shown (App. 145-146):

"Name:

Maske, Edith * * * *
* * * *

Part to be examined (or treated): A. P. lateral rt. ankle.

Clinical diagnosis: Sprain, rt. ankle.

Date 19 July 1945 * * *
* * *

"There are extensive hypertrophic changes about the right ankle joint and the tarsal bone. There is a quinus deformity of the foot and considerable deformity of the tarsal bones. No evidence of recent injury.

(Signed) A. O. Hampton

July 20, 1945

Lt. Col., M. C."

Here were observations and findings which were in the language of our Court of Appeals:

"Regularly recorded facts as to the patient's condition or treatment on which the observations of competent physicians would not differ."

Reasonably competent physicians would no more differ upon the presence of "extensive hypertrophic changes about the right ankle" and a "quinus deformity of the foot" and "considerable deformity of the tarsal bone" than they would about the examples of admissibility listed in *New York Life v. Taylor, supra*, of a routine examination stating "no external injuries," a record stating the patient

had "a fractured right clavicle," a record from a "laboratory giving the analysis of food," and "laboratory tests and history sheets." Here we are not dealing with conjectural and speculative opinion involved in the diagnosis of a psychoneurotic state, which was what the *Taylor* case held was properly excluded from evidence. Competent men could as easily and uniformly detect extensive hypertrophic changes as they could a rash on the face.

The prejudicial effect of the exclusion of the foregoing 1945 X-ray report is readily appreciated when it is recalled that appellee's Dr. Frohman testified of his own 1947 examination and X-rays as follows (App. 158):

"Q. They revealed substantially this, didn't they Doctor, that there were extensive hypertrophic changes about the right ankle and joint and tarsal bone; that there was a quinus deformity of the foot and considerable deformity of the tarsal bone?

"The Witness: Yes."

And the further testimony of her orthopedic expert, Dr. Hand (App. 119):

"Q. What is a quinus deformity, sir?

A. A quinus, it is a downward position of the foot, like a horse's foot.

"Q. Assume the truth of this fact, Doctor: That on July 20, 1945, the plaintiff's right ankle was X-rayed and this was the finding:

'There are extensive hypertrophic changes about the right ankle, foot and tarsal bone. There is a quinus deformity of the foot and considerable deformity of the tarsal bone. No evidence of recent injury.'

That was in 1945. Assuming the truth of those facts, Doctor, would that indicate to you that the condition you saw in '48 and '49 was probably a developmental thing as distinguished from caused or aggravated by any stepping on the instep of the foot?

A. If that report were true, I would.

Q. I have asked you to assume that.

A. Assuming that, I think that the trauma had not too much to do with it."

Yet, despite the foregoing, appellant was deprived of showing the fact that appellee's right foot condition existed two years before the alleged trauma, and this under *New York Life v. Taylor*, the very opinion that recognized the admissibility of the evidence. This error, alone, necessitates reversal of the trial court.

2. (c) *Admission of the traffic regulation on "following too closely" for which there was no basis in the evidence, was error.*

Even from the appellee there was no testimony on following the taxicab by the bus in tandem. There was no such allegation in the complaint nor at pretrial, nor was there any attempt to amend at the trial to urge such a ground for a negligence finding. All witnesses who testified on the point agreed that the accident happened "very suddenly" (App. 51) when the taxicab cut from the right over into the traffic lane occupied by the bus (App. 48). The bus driver's testimony was undisputed that he first saw the taxi stopped parallel to the curb (App. 124, 126), that the taxi pulled out from the parking lane on his right (App. 124), that when he saw it pulling out he applied his brakes and that this was before it got in front of the bus (App. 130), and that the bus stopped within approximately four feet. (App. 130).

Since there was no basis for the traffic regulation it was irrelevant and should not have been admitted over appellant's objection (App. 165) and urged before the jury. As this Court said of an irrelevant instruction in *Howard v. Capital Transit Co.*, 82 U. S. App. D. C. 351, 353, 163 F. 2d 910, 912 (1947):

"The appellant says the court erred in refusing a third instruction to the effect that it was the company's duty to furnish a reasonably safe loading platform. There was no pleading or proof that the platform, which conformed to governmental specifications, was unsafe. Statements of irrelevant principles of law, however sound in the abstract, have no place in instructions to juries."

The same is true of irrelevant traffic regulations, appellee's counsel never having sought to amend to include as a charge of negligence any "following too closely" even after he recognized that his proof had not sustained his charges of negligence by stating (App. 165):

"My case is cast on this one rule, Rule 34."

Here again is prejudicial error which, apart from all the others, necessitates reversal of the trial court.

3. *Reversible error appears in the Court's charge:* (a) as to "highest degree of care" rather than "reasonable care" under similar circumstances; (b) in effect charging *res ipsa loquitur* in an inapplicable case; (c) in instructing that proof of a sudden stop imposed a duty on appellant of affirmatively making a showing of non-negligence.

3 (a) The Court's charge was replete with prejudicial error. Although the charge was given rapidly, appellant notified the Court in as great detail as possible of its objections. The most mystifying error was the trial court's persistent refusal to obey this Court's plain instructions as to the proper degree of care language to be used in carrier cases as contained in the recent case of *Hecht Co. v. Jacobsen*, 180 F. 2d 13 (D. C. Cir. Jan. 16, 1950). Citing that case, appellant's Requested Instruction No. 1 was as follows (App. 10):

"The jury is instructed that the defendant carrier was not an insurer of the safety of its passengers, its duty being to exercise that reasonable care and caution which would be exercised by a reasonably prudent and cautious person under the same or similar circumstances."

That the Court's ultimate instruction that "A common carrier is required by law to exercise the highest degree of care for the safety and protection of its passengers" (App. 171) was not mere inadvertence is made clear from the following surprising colloquy at the bench (App. 168):

"Mr. Bress: Object to Defendant's No. 1.

The Court: I refuse that.

Mr. Roberson: Are you familiar with that case?

The Court: I am familiar with that case, *Hecht Co. v. Jacobsen*. I do not believe it is applicable.

Mr. Roberson: Your Honor, I specifically object to reference to highest degree of care. I think the Court of Appeals has held otherwise.

The Court: I am going to let them do it again.

Mr. Roberson: Say it again. We say they will have the chance.

The Court: Fine. If they do it again, there will be no ambiguity about it."

Orderly administration of justice is impeded by such refusal upon the part of a lower court to apply law expressed by the appellate tribunal only five months before. In *Hecht Co. v. Jacobsen, supra*, use of the term "highest degree of care" did not in that case constitute reversible error because the trial court had made it clear that, as this Court pointed out, at 15:

"What is 'reasonable' in certain circumstances may be unreasonable in others; that the particular factual context may vary the care which must be exercised."

However, this Court made its own views clear as to the use of the expression by stating further, at 15:

"If such content had not been given to the 'highest degree of care,' and instead, the meaning thereof left entirely to the jury, we might well have been compelled to find error in the charge. * * * *

"We do think, however, that it would have been more in accord with the modern authorities to discuss the standard of conduct required of appellant in terms of 'reasonable care under all the circumstances.' That formula contains within it the potential for flexibility in application which is necessary to deal with the infinite number of fact situations which may arise. It readily permits change with changing circumstances."

The trial court, in the instant case, far from thus avoiding the danger of having the jury exact a standard of per-

formance from appellant impossible of fulfillment, stated to the jury (App. 171):

“Failure to exercise the highest degree of care constitutes negligence.

“The highest degree of care means reasonable care in the superlative degree. In other words, a common carrier is bound to exercise all the care, skill, and foresight within reason practicable under the circumstances.”

It is submitted that the court's charge left the jury free to convict appellant of negligence for not creeping along E Street at one mile per hour, which, of course, would have prevented the necessity of a sudden stop. It left the jury free to find negligence from a failure to anticipate that a taxicab would suddenly and without signal violate traffic regulations by cutting out from the curb immediately in front of a lane of moving traffic. As this Court has pointed out, common carrier traffic “could not be maintained in crowded cities” if such traffic had to be timed upon any other assumption than that an oncoming automobile or streetcar will be observed. *Jackson v. Capital Transit Co.*, 69 App. D. C. 147, 150, 99 F. 2d 380, 383 (1938).

3 (b), (c). *Error was committed in charging the jury as if the case were pitched upon res ipsa loquitur and compounded by erroneously charging that the effect of proof of a sudden stop cast upon appellant the duty of countervailing the inference of negligence.*

In pertinent part the jury was instructed that (App. 172):

“* * * although a passenger assumes the natural consequence of normal jerks as a part of the ride in a public conveyance, a sharp, unusual or violent stop is evidence from which a legitimate inference of negligence may be inferred. This is only a presumption, however, and casts upon the defendant the duty of showing that such a stop was caused by circumstances beyond the control of the driver while exercising the highest degree of care and caution.

The defendant must show two things:

(1) *That the driver had exercised the required degree of care to avoid a perilous situation, if such situation is shown to have existed. The degree of care required is a high degree; this may be violated through the use of unsafe speed; or failure to keep a proper lookout, or failure to anticipate the act of the driver of the other automobile involved in the perilous situation if such situation is shown to have existed.*

(2) *That when confronted with an unexpected crisis, if such is found by the jury to have existed, the driver exercised that degree of care which he was required to exercise as the operator of a common carrier. In this situation, he was not required to exercise the more ordered judgment which he would have been required to exercise under more ordinary circumstances."* (Emphasis added.)

Under the District of Columbia decisions, the foregoing charge could hardly be characterized as anything other than shocking, and prompt protest was made to the trial judge by appellant's counsel (App. 174).

In the first place, this was a specific negligence case and not one which in the complaint, pretrial order, or course of trial proceeded upon a theory *res ipsa loquitur*. The reason is simple; appellee was present on the bus, saw Mrs. Gladys Page step on her foot and testified that the precise reason therefor was a sudden stop of the bus when nothing was in front to justify it. Appellee had herself at one time alleged negligence upon the part of Mrs. Page, and appellee's counsel undertook to prove allegations of specific negligence as to the bus company. This was, therefore, emphatically not such a situation as was involved in *Capital Transit Co. v. Jackson*, 80 U. S. App. D. C. 162, 149 F. 2d 839 (1945) where a streetcar passenger merely testified that she was injured when without any fault of her own the streetcar and a laundry truck collided. In that case the appellee could not be said to have been expected or required to be on watch against accidents or collisions with other vehicles. In the instant case, however, appellee testified that she *was* on watch at the time of the sudden stop (App.

34) and she stated precisely the actions of Mrs. Page which resulted in the alleged injuries (App. 17, 31). This was not a case where the passenger was not looking out and the facts would therefore be peculiarly within the carrier's knowledge. On the contrary, appellee was looking out and had *an even better opportunity than the bus driver* to know what went on inside the bus behind his back. Therefore, the reason for *res ipsa* was lacking and the "violent stop" instruction which brought in the inference was error. This Court has held that a declaration claiming a carrier negligently caused a car "to be put in motion suddenly" failed to state a cause of action. *Connor v. Washington Ry. & E. Co.*, 43 App. D. C. 329 (1915). Nor can a passenger go to the jury on a *res ipsa loquitur* theory merely because injured while alighting where the evidence showed any of several things might have brought about an injury. *Brown v. Capital Transit Co.*, 75 U. S. App. D. C. 337, 127 F. 2d 329 (1942). Appellee's case had the same fatal defects as did the two cited.

In the second place, even if this were a *res ipsa loquitur* case, the trial court went completely astray in instructing the jury that the effect of the presumption "casts upon the defendant" the duty of showing the stop was caused by circumstances beyond the control of the driver and of showing "(1) that the driver had exercised the required degree of care to avoid a perilous situation" and "(2) that when confronted with an unexpected crisis," he exercised the requisite degree of care. This Court has certainly made it plain that *making out a res ipsa case does not require a defendant to do anything*. The most recent pronouncement is found in *Underwood v. Capital Transit Co.*, 183 F. 2d 822, 823 (D. C. Cir. May 29, 1950):

"* * * the mere fact that the inference exists in contemplation of law as a mechanical device to take the case to the jury does not compel its acceptance by the triers of fact. They are at liberty to decide for themselves whether the preponderance is with the plaintiff *even where there is no evidence to countervail the inference.*" (Emphasis added.)

To like effect are *Sweeney v. Erving*, 228 U. S. 233, 240 (1913), and *Safeway Stores v. West*, 180 F. 2d 25, 26 (D. C. Cir. Jan. 23, 1950).

C. The weight of the evidence and the numerous errors on the trial entitled appellant to have its motion for judgment notwithstanding the verdict or a new trial granted.

CONCLUSION.

Since negligence was not proved upon the part of appellant by appellee, the verdict was against the evidence and appellant was and is entitled to judgment in its favor. Since there were at least eight highly prejudicial errors committed on the trial in failures to declare a mistrial, in admissions and exclusions of evidence and in the charge to the jury, the minimum relief to which appellant is now entitled is a new trial before a jury uninfluenced by considerations of insurance and sympathy, upon all of the properly admissible evidence, and only that, and upon proper instructions as to the standard of conduct required of it and its duty with respect to the production of proof.

Respectfully submitted,

GEORGE D. HORNING, JR.,
FRANK F. ROBERSON,
Attorneys for Appellant
810 Colorado Building
Washington, D. C.

HOGAN & HARTSON,
Of Counsel.

BRIEF FOR APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 10,792

WASHINGTON, MARLBORO & ANNAPOLIS MOTOR
LINES, INC., *Appellant*,

v.

EDITH MASKE, *Appellee*.

Appeal from the United States District Court for the
District of Columbia.

ALVIN L. NEWMYER,
DAVID G. BRESS,
ALVIN L. NEWMYER, JR.,
Attorneys for Appellee.
Rust Building,
Washington, D. C.

STATEMENT OF QUESTIONS PRESENTED.

In the opinion of the appellee, the questions are not as stated by the appellant, but rather:

A. Whether in a jury trial of a personal injury case where plaintiff establishes an admittedly prima facie case and defendant's case consists of attempts to impeach the plaintiff's testimony and a frustrated effort to deny its negligence, there is any basis to claim error in the court's submission of the case to the jury or in the court's order overruling a motion for new trial merely because plaintiff's testimony was only corroborated in part by others.

B. Whether the court's exercise of a judicial discretion can be said to have been abused in its ruling on numerous matters involving the admission or exclusion of evidence or claims of prejudice, none of which was of any consequence.

C. Whether the court properly charged the jury on the doctrine of *res ipsa loquitur*.

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IN THE

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EDITH MASKE, *Appellee*.

Appeal from the United States District Court for the
District of Columbia.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

This is an appeal from a judgment of the District Court entered upon a verdict of a jury in favor of appellee, Edith Maske, hereinafter referred to as plaintiff, against the appellant, W. M. & A. Motor Lines, Inc., hereinafter referred to as defendant. The action was brought for personal injuries sustained by plaintiff while a passenger on defen-

dant's bus, due to a sudden, violent and unexplained stop of said bus while travelling on the public streets of the District of Columbia.

Since the defendant's statement of case is replete with misleading statements and inaccuracies, it is believed necessary to furnish a brief, but accurate history of this case, which follows hereinafter.

Plaintiff was a partial amputee prior to this accident, having sustained the loss of her lower left leg when it was removed in 1945 at Walter Reed Hospital (App. 11).^{*} However, she had never had any difficulty in walking, and even after her amputation at Walter Reed she was able to walk in a perfectly normal manner without assistance of crutches or cane (App. 12, 14-15, 23). Her right leg and foot had never given her any trouble and were perfectly normal to her knowledge (App. 44).

At about 4 P.M. on July 9, 1947, plaintiff was a passenger on a bus of defendant, which was proceeding in an easterly direction on E Street, N. W., in the District of Columbia (App. 15). When plaintiff boarded the bus at the terminal it was crowded, all the seats were filled and passengers were standing (App. 16). The defendant's bus was permitted to pick up, but not to discharge passengers within the District limits (App. 16). Plaintiff sat in the long seat facing the center aisle of the bus directly behind the driver (App. 16). The bus made one stop at 7th & E after leaving the terminal and about 4 or 5 more passengers got on, and stood nearer the front of the bus, almost to the point where plaintiff was sitting (App. 16). The bus then started up, crossed 6th Street on the green light, picking up speed as it went along (App. 17). Just after the bus crossed 5th Street, it came to a sudden, complete and violent stop, jarring and throwing in varying degrees all of the passengers who were on the bus (App. 17-18, 36, 50, 52, 56, 61, 124, 132). No warning whatever was given that a stop was about to be made (App. 18). As a result of this violent stop, a standing woman passenger, Mrs. Gladys Page, who was holding

^{*} References to the Joint Appendix are made as follows: (App.), and references to the Record as follows: (R.).

onto a pole (App. 48) was hurled headlong toward the front of the bus, and, as she grabbed for a pole near the plaintiff in order to stop her forward movement, she ground the cuban heel of her shoe into the top of plaintiff's right foot, just below the ankle (App. 17, 31, 36, 52). Plaintiff said that while Mrs. Page was attempting to regain her balance, her heel was pressed into plaintiff's ankle, not just once, but about three times (App. 36). Mrs. Page was thrown so violently as a result of the sudden stop she had no control over stepping on plaintiff's foot (App. 52). As soon as this occurred, plaintiff suffered severe pain in her right ankle (App. 18) and began to cry (App. 17, 18, 19). She asked the bus driver to stop because she was hurt and was unable to walk due to the injury to her only good leg. The driver went on down the block and then stopped and asked who had been hurt and, when advised by plaintiff that she was injured, he took down her name, and the names of witnesses (App. 17, 18, 19, 37-38, 48, 53, 55, 56). Plaintiff remained on the bus until her destination and was helped from the bus by two men and then procured a taxi for the remainder of her trip home. She went to bed immediately and was treated by her family doctor, Dr. E. W. Schwartze, at her home that evening (App. 21).

She was subsequently treated by Dr. I. Phillips Frohman and Dr. Frank Hand. Without going into a detailed account of plaintiff's injuries, since it is not made necessary by this appeal, the evidence showed that plaintiff has a permanent and serious injury to her ankle, that she has had to use crutches almost constantly since the accident (R. 45, 46), that the condition of her ankle has not improved (R. 50-51, 55), and that the doctors have advised her to undergo a fusion operation of her ankle to relieve the pain, which will permanently stiffen the ankle in an abnormal position (App. 118), and which still may be unsuccessful (R. 351, 353). Even after the fusion operation, she will always need the assistance of crutches or cane, which she never needed prior to this accident (R. 353, App. 12, 14-15, 23).

At the trial, plaintiff relied upon the doctrine of *res ipsa loquitur* and rested her case upon the foregoing testi-

mony. *Defendant conceded that plaintiff had made a prima facie case by not making a motion for directed verdict.*

Defendant's case on liability consisted of the testimony of three witnesses, who were passengers on the bus, and the bus driver himself. Defendant intended by their testimony to show that the sudden stop of the bus was due to a taxicab which had stopped suddenly in front of the bus, but the evidence introduced through these witnesses was so conflicting and so unconvincing that it fell far short of meeting plaintiff's prima facie case. In fact, the testimony of two of the passengers was to the effect that the taxicab had never stopped or slowed down (App. 50, 51, 53, 56, 58-59), and the third passenger only saw a taxicab standing still in front of the bus after the sudden stop of the bus, but did not see it prior to that time; and she could not state how long it had been standing still, or what the bus driver had done with reference to the taxicab prior to the bus' sudden stop (App. 61-62).

The bus driver was the poorest witness defendant produced. He tried to show that the taxicab had suddenly left its parked position at the curb, and, after getting directly in front of the bus, stopped suddenly for no apparent reason (App. 124, 131). But on each of the vital facts of the accident, the defendant's bus driver was a complete blank. He could not state where his bus was when he first saw the taxicab at the curb (App. 128-129); he could not say how far to the rear of the taxicab he was when he saw the taxicab leave the curb and start forward (App. 129); he didn't know how far the taxicab traveled from the curb before it came to a stop (App. 131, 134), and he didn't know how far the bus travelled during the same time (App. 138); he couldn't state how fast the taxicab was going when it left the curb (App. 132, 134), or how fast it was going when it was in front of the bus (App. 133, 134); he didn't know whether the rear stop lights of the cab went on when its brakes were applied (App. 133, 135-136); he didn't know how far the cab travelled forward while it was in the act of stopping (App. 135); and he didn't know how far behind the taxicab he was when both vehicles were in motion (App.

136). The only positive testimony from the bus driver was that he was only 12 feet to the rear of the taxicab when he applied his brakes, and was only 8 feet behind it when the bus came to a stop (App. 130). In view of this testimony, the plaintiff introduced in rebuttal, and the court properly admitted the traffic regulation on "following too closely" (App. 164-166).

The entire balance of defendant's case consisted of efforts to impeach the plaintiff on certain issues, a few of which were material, and most of which were immaterial. None of this so-called "impeaching" evidence was convincing to the jury or to the trial court, who had the duty of passing on the credibility of the witnesses, but defendant nevertheless insists on re-arguing the same matters to this court on this appeal. Full answers to these contentions are found in the Argument herein.

For the convenience of this court the same sequence and numbering system which defendant has used in its brief has been followed by plaintiff in answering each of defendant's contentions.

SUMMARY OF ARGUMENT.

Plaintiff's case was tried on the theory of *res ipsa loquitur*, as indicated by the pre-trial order, and defendant is completely wrong in contending that simply because excessive speed on the part of the bus was incidentally testified to by plaintiff in characterizing the violence of the sudden stop, that plaintiff lost the right to rely on the doctrine. Speed was neither attempted to be proven nor was it proven as the precise cause of the injury, but the abrupt, unusual and violent stop of the bus was the precise cause of the accident and the testimony of all witnesses on this issue was unanimous. Plaintiff, therefore, established a *prima facie* case by proof of this unusual, violent and sudden stop, which required submission of the case to the jury so as to permit the jury to draw an inference of negligence on the part of defendant's bus driver. Defendant conceded plaintiff's *prima facie* case by failing to make even the customary mo-

tion for directed verdict at the close of plaintiff's case. The evidence offered by defendant in an attempt to explain away its own negligence was either corroborative of the negligence of the bus driver or was so uncertain as to be valueless to support defendant's contentions. Realizing the utter weakness of its own evidence on the issue of liability, defendant takes another tack by claiming that plaintiff was impeached in several material particulars on other issues, and, therefore, her testimony on the issue of liability, even though supported in large measure by defendant's witnesses, should not be accepted—thus, of course, leaving no testimony on plaintiff's case and requiring a verdict for defendant. Aside from the fact that defendant's own evidence on its negligence would have raised a jury question, regardless of plaintiff's testimony, and, further, aside from the fact that the question of credibility was within the jury's province and was settled by the jury's verdict, it is apparent that none of defendant's so-called "impeaching" evidence succeeded in impeaching the plaintiff's credibility.

The claim that prejudicial error occurred by the mention of defendant's insurance company and members of its investigative staff is without merit. Defendant laid open to inquiry the subject of its insurance protection by producing as a witness one of its insurance investigators who claimed to have taken a statement from the plaintiff. Furthermore, the reference to insurance was not prejudicial in view of the status of defendant as a large local public carrier whose financial standing makes the reference to insurance completely unimportant as far as any juror would be concerned. Nor did defendant request that the jury be instructed to disregard the casual reference made in the testimony. The other alleged prejudicial errors concerned plaintiff's testimony as to her sick husband and her financial situation. The testimony on both these points was pertinent to answer defendant's contentions regarding plaintiff's absence from work prior to her accident and her failure to secure recent medical attention. The answers which plaintiff gave were honest and proper, and if they had not

been given defendant would have secured an unwarranted advantage by making capital of plaintiff's failure to satisfactorily explain the reasons for both actions.

Defendant next attempts to avoid the effect of a pre-trial stipulation concerning a doctor's report by a belated complaint that defendant's counsel did not understand what the pre-trial exhibit purported to be. In the first place, the exhibit showed on its face what it represented and there was no excuse for defendant's counsel to claim any misrepresentation or misunderstanding. In the second place, no prejudice resulted to defendant by its admission since it could have attempted to rebut the report if it chose to do so by other records which were available to it, yet it failed to do so.

Defendant claims error in the exclusion of a Walter Reed Hospital record. This record was privileged and was clearly inadmissible on this ground alone, but, nevertheless, much of the matter which defendant sought to introduce from this record was completely immaterial to the issues of this case. In addition, defendant tried to admit in evidence from this record an x-ray diagnosis, without giving the plaintiff an opportunity either to examine the x-ray itself or the doctor who made it. Furthermore, the defendant managed to bring the very language of the report to the attention of the jury anyway and the record shows detailed and extensive questioning concerning the same condition that the x-ray report showed—therefore, its exclusion from evidence was not only not prejudicial but immaterial.

Defendant claims error in the court's admission of the traffic regulation on "following too closely". Plaintiff introduced this regulation in rebuttal because the testimony of defendant's bus driver showed a clear violation of this regulation, and its admission was, without doubt, proper.

Defendant also claims error in the trial court's refusal to accept defendant's interpretation of the case of *Hecht Co. v. Jacobson*, 180 F. (2d) 13. The trial court was clearly right in holding that that case does not outlaw use of the term "highest degree of care". The jury was told that the

facts of the accident must be considered in determining whether defendant fulfilled its duty to plaintiff as a passenger, and the jury was specifically advised that the burden of proof remained upon the plaintiff to prove defendant's negligence.

There was no error in the court's ruling that the *res ipsa loquitur* doctrine was applicable to the facts of this case. The sudden, unusual, and violent stop of defendant's bus made the doctrine applicable, and there is no merit in defendant's contention that plaintiff should have known the cause of the accident. Furthermore, the charge of the court was a proper statement of the doctrine of *res ipsa loquitur*, and did not, as defendant claims, tell the jury that defendant was required to produce evidence to countervail the inference of negligence. The language of the instruction was in accord with the well established principles of the rule, and there could have been no misinterpretation by the jury of the effect to be given the inference of negligence which the jury was permitted to draw.

In conclusion, the defendant's evidence wholly failed to establish a good defense to plaintiff's admittedly *prima facie* case, and defendant's weak attempt to escape a verdict by flimsy claims of prejudice do not warrant a reversal.

ARGUMENT.

A.

There Was Ample Evidence of Defendant's Negligence and the Trial Court Did Not Err in Denying Defendant's Motions for Directed Verdict, for Judgment N.O.V. and for New Trial.

1. Defendant claims that plaintiff rested its case on allegations and proof of specific negligence rather than on the theory of *res ipsa loquitur*. Defendant is completely wrong. The amended complaint pleaded negligence generally in paragraph 3 (App. 2-3) and, as the rules allow, (Rule 8(e) (2), F. R. C. P.) pleaded, in the alternative, in paragraph 4, excessive speed and a sudden abrupt stop of defendant's bus.

At pretrial, plaintiff relied solely on *res ipsa loquitur*, arising from an unusual and sudden stop (App. 5-6). Defendant admits that the claim of speed was "abandoned at pretrial" (Defendant's brief, pg. 10). The statement at the bottom of the Pretrial Order that "plaintiff claims the bus driver was negligent" was certainly not an assertion of specific negligence. It did mean that the sudden stop, upon which plaintiff relied to bring the doctrine of *res ipsa loquitur* into operation, was due to defendant's negligence. Defendant itself states on page 11 of its brief that plaintiff was required to prove a "negligent sudden stop". That is exactly what the pretrial order alleged.

Defendant next claims that the issue of speed was "revived" at the trial and claims that excessive speed was not proved by substantial evidence. In the first place, there was no such revival of speed as an issue. During the course of her direct testimony, the plaintiff stated her estimate of the speed of the bus, but this testimony merely supported the evidence of the sudden stop and was explanatory of its character and effect. Obviously a violent and sudden stop of a bus going 30 m.p.h. will have far more damaging effects than a bus travelling 10 m.p.h. Although defendant admitted that its bus made a sudden stop, throughout the trial and during its counsel's opening and closing arguments, it alleged that the plaintiff's injury was a mere bruise, that the sudden stop occurred when the bus was travelling only 10 m.p.h. (App. 124), and that there was little force exerted when plaintiff's foot was stepped upon (App. 31). Thus, the speed of the bus at the time the stop was made was a pertinent answer to these allegations concerning the nature of the sudden stop. Proof of the purpose of this evidence is the following testimony of plaintiff (App. 19):

"Q. The speed at which you said the bus was driving, will you state what the speed was at the time he jammed on the brakes?

A. I would say it was between 30 and 35 miles an hour."

Defendant asks this court to take judicial notice of the fact that if the bus was speeding, evidence should have been introduced by plaintiff relative to the skidding of the bus' tires. We can only say that if defendant's bus driver had called the police as plaintiff requested him to do (App. 17, 19), and as the law required, there would have been physical evidence introduced to prove this point.

Defendant also mentions, with reference to the issue of speed, the testimony of three passengers on the bus who were called as witnesses by the defendant. None of that testimony was convincing. Although Mrs. Page said the bus was going a normal speed for the time of day, she could not state what its normal speed was and said "It is just what I presume" (App. 49). Mrs. Augusti, when first asked by defendant's counsel about the speed of the bus, replied that she could not recall. When pressed on this point she said it was not going *very* fast (App. 56). She did not estimate the speed of the bus in miles per hour. Mrs. Calder, although she said the bus was going at a moderate rate of speed, admitted she did not drive a car (App. 62); that she was not a good judge of speed (App. 65); that she had never been on any bus within the city limits that travelled over 15-18 miles per hour, and that she was "daydreaming" and "not paying any particular attention to speed" (App. 64-65).

It is plaintiff's position that the case was tried on the theory that the doctrine of *res ipsa loquitur* was applicable because of the sudden, violent and unusual stop of defendant's bus. The speed of the bus was, therefore, material to show the character of the stop made. Furthermore, the issue of speed became pertinent at a later point in the trial to be considered by the jury as rebuttal of defendant's testimony that the sudden stop could not be avoided in the exercise of the highest degree of care because of a sudden stop of the preceding taxicab. Consequently, the traffic regulation on speed was introduced by plaintiff in rebuttal (App. 164-165).

Although, as indicated above, the plaintiff's testimony on speed was merely corroborative of the evidence of the

sudden and violent stop of the bus, this testimony, standing alone, still did not waive plaintiff's right to rely upon the *res ipsa loquitur* doctrine. Defendant apparently misunderstands the basis for the doctrine if it contends that simply because plaintiff testifies to a fact which might constitute a violation of a regulation, or might, in another situation, form a basis for a specific charge of negligence, then the *res ipsa* doctrine must go out of the case. As stated by the annotator in 93 A. L. R. 610:

"There seems to be a unanimous feeling among the courts that have considered the question that the mere introduction, under general allegations of negligence, of evidence of specific acts of negligence *which are not proved to be the precise cause of injury*, and thus to preclude any inference of negligence, does not prevent resort by the plaintiff to the presumption of negligence arising out of the doctrine of *res ipsa loquitur*." (italics supplied)

Accordingly, there can be no serious contention here that plaintiff rested its entire case on the issue of speed, or that speed was proven by anyone to be the precise cause of the injury. On the contrary, the sudden and violent stop of the bus, was, without question, the cause of this accident and that is exactly what plaintiff proved without any contradiction.

Every witness in the case testified the stop was sudden, unusual and violent. The plaintiff testified (App. 17-18):

"...it came to a complete stop, a violent stop, and this girl that was standing on the front holding onto the front seat, she was thrown so far she grabbed and grabbed for the poles as she went along. This one pole she grabbed for, if she hadn't finally made the second grab she would have been thrown clear through the bus. She had on white high-heeled shoes with leather heels and no taps on them and she just ground her heel in my ankle."

Q. Was any warning of any kind given to you that this violent stop would be made? A. No, sir, there wasn't.

Q. Did the lady that stepped on your foot—was she thrown as the bus made the stop? A. Yes, sir.

Q. Were other passengers on the bus also thrown? A. Yes, sir.

Q. Were you thrown? A. Yes, sir.

Q. Was the stop anything like any other stop you had experienced while riding on buses? A. No, sir, it was not.

And under cross examination, plaintiff testified (App. 36):

Q. Can you answer my question—whether she stepped on your foot when she swung forward or after she had completed her swing forward in trying to regain her balance? A. No, sir, she swung forward. She would have gone right through the front of the bus if she had not regained her grip. She not only stepped on my foot once, but three times.

Q. All on the top of your foot? A. Yes, sir.

Q. You say that other people on the bus were thrown? A. Yes, sir.

Q. Besides this lady. Did you see them outstretched? A. I wouldn't say they were thrown down, but they were thrown.

Q. What do you mean by "thrown"? A. Well, they all grabbed for something and some of them, I couldn't see because I was hurt.

Q. You testified that people were thrown? A. Yes, sir.

Q. Do you know whether they were thrown out of their seats or on the floor or whether they were thrown at all? A. They were thrown, yes, sir.

Mrs. Gladys Page testified (App. 50, 52):

Q. The stop of the bus was not a usual stop, was it? It was not a normal stop? A. No, sir.

Q. It was an abrupt, sudden, violent stop that threw you from your holding position forward sufficiently to step on this lady's foot? A. That is correct.

* * * * *

Q. Were you thrown pretty violently? A. Well, yes, I was.

Q. And when you were thrown, you had no control over stepping on this lady's foot? A. No, I did not.

Q. What happened to you in stepping on her foot would have happened to any of us if we had been standing where you were? A. I am sure of that.

Mrs. Augusti said that "there was a sudden stop of the bus, sudden jerk" (App. 56). Mrs. Calder said, "... the bus came to a sudden stop and I heard an outcry" (App. 61).

Defendant's own bus driver stated, "... I came to an abrupt stop. I jammed on the brakes" (App. 124), and later he testified as follows (App. 132):

Q. Was the stop made so abrupt and sudden so it caused people to be thrown? A. Not to the floor.

Q. It was such a stop as would cause people to be thrown? A. Yes, sir.

He was then asked: (App. 136-138)

Q. What conversation did you have with Mrs. Maske prior to your starting up after you stopped suddenly? A. I asked if anyone was hurt.

* * * * *

Q. Did anyone respond? A. Yes, sir.

Q. Was that Mrs. Maske? A. Mrs. Maske.

* * * * *

Q. How soon after your bus stopped abruptly did you ask that question? A. It could not have been over a few seconds.

* * * * *

Q. You knew at the time you asked Mrs. Maske how badly she was hurt, how she had become injured? A. Yes, sir.

Q. And you saw the lady that was thrown by the abrupt stop that stepped on her foot? A. Yes, sir.

The above evidence is ample to support an inference of negligence on the part of the defendant's bus driver. Such a stop, on a public conveyance, as above described, certainly does not occur in the usual course of travel and is sufficient to justify an inference of negligence. *This, the defendant effectively conceded, by failing even to make the customary motion for directed verdict at the close of plaintiff's case.*

Defendant now contends that the whole evidence preponderated in favor of defendant and that the verdict was against the weight of the evidence, because the sudden stop was conclusively shown not to have been the fault of the bus driver. Defendant is again wrong.

In order to explain away its own negligence to the jury and now to this court, defendant attempts to throw the blame for the accident upon an unknown taxicab which, for no apparent reason, was supposed to have made a sudden stop in front of the bus. All of the testimony concerning this taxicab was to the effect that at the time it was said to have stopped in the middle of the street in front of the bus, there was no traffic in front of it, either autos or pedestrians, and the traffic light was still green (App. 52, 130-133). Furthermore, the bus driver said nothing at the time of the accident to indicate that the accident was due in any way to the taxicab (App. 57), nor did he get the license number of the alleged taxicab or testify that he attempted to get it (App. 124).

With respect to the taxicab, the testimony of the three passengers on the bus was completely contradictory, refuted the bus driver's story, and was insufficient to sustain defendant's contention. Mrs. Page first stated that the taxi was travelling faster than the bus since it passed from behind, and then this witness, realizing the effect of her answer, changed her testimony to state that the taxi must have been going slower than the bus to cause the bus to stop (App. 50-51). (The bus driver denied that the taxicab ever travelled beside the bus (App. 134)). Mrs. Page also said that the taxicab cut in from the right of the bus and kept on going (App. 50), "*it never did slow down or stop*" (App. 51, 53). Mrs. Page did not see the taxicab before or at the time the bus passed it, and was unable to throw any light on the question of what the bus driver was doing when the taxicab left the curb (App. 51). Mrs. Augusti first saw the taxicab after the sudden stop, and she did not recall whether the taxicab was in motion or at a standstill at that time (App. 56), although she later indicated it was in motion when she saw it (App. 58-59). She

couldn't say whether the taxi had ever stopped (App. 59). She said it was a "light colored cab . . . cream colored" (App. 59). This witness admitted that the only reason she thought the taxicab had caused the bus to stop was from her "own conception . . ., my conclusion," which the trial court properly struck from the record (App. 57). Mrs. Calder was "daydreaming" in the bus and after the sudden stop, she saw that "a car was stopped in front of the bus" (App. 61). Her conclusion that the car must have caused the bus to stop suddenly was also stricken by the trial court. (App. 61-62).

With respect to the taxicab, defendant's bus driver was the most unsatisfactory witness of all. He said the cab was black and was driven by a colored woman (App. 126); that he saw the cab standing at the curb (App. 128), but he could not estimate how far behind the taxicab his bus was at that time, even by comparison of distances in the courtroom, nor could he say how far to the rear his bus was when the taxicab started up (App. 129). He didn't know how fast the taxicab started up (App. 129); he watched the taxicab the entire time after it left the curb and pulled in front of him, yet he did not sound his horn (App. 129). He first said that the taxicab was heading straight east when he applied his brakes (App. 130), and then said that he applied his brakes before it got in front of him when it was pulling out (App. 130). The bus driver next stated that he was only 10-12 feet to the rear of the taxicab when he saw it pull out, (App. 130), but then indicated that it was 12 feet in front of him before he applied his brakes (App. 130, 133-134), because he stopped in 4 feet and the taxicab was 8 feet in front of him after both had stopped (App. 130, 133-136); he didn't know how far the taxicab had travelled from the curb before it stopped in front of him (App. 131, 134); he didn't know how fast the taxicab was going when it pulled out, or when it was in front of the bus (App. 133); he didn't know whether the rear stop lights of the taxicab went on, but he would not deny it (App. 133); his bus was at all times behind the taxicab and the taxicab was

never alongside the bus (App. 134) and he couldn't estimate the taxicab's speed at any time (App. 134).

It is quite apparent that the only conclusion which can be drawn from the bus driver's testimony is that he knew practically nothing about the accident, and what he did know was completely contradictory and confusing. It is amazing that defendant can claim that this kind of testimony is sufficient as a matter of law to rebut a prima facie case, even assuming for this purpose that an inference of negligence can be rebutted so as to warrant a directed verdict.

Defendant claims that plaintiff must have seen the taxicab if she was looking ahead in view of the "overwhelming proof" that it was there to be seen. In the first place, the testimony of the three passengers and the bus driver described above is hardly overwhelming. In the second place, the plaintiff testified on cross examination (App. 34):

Q. And you say there was no car there? A. I wouldn't state positively there wasn't any car there because I was hurt.

Q. Did you look before the accident? A. But I didn't see a car there.

The fact that plaintiff did not see the taxicab, if one was there, is not surprising, in view of her seated position on the bus and the painful injury she sustained.

Defendant contends that bare proof of an injury following a sudden stop does not raise a sufficient question for the jury—but that is not a fair statement of the question on this appeal. It cites *Brown v. Capital Transit Co.*, 75 U. S. App. D. C. 337; 127 F. (2d) 329, which is not in point. In that case, this court said "Appellant's allegations of negligence are vague rather than specific and as applied here go no further than an allegation of negligent maintenance of the car. But there is not a single word in plaintiff's testimony on which to predicate a verdict on this ground." The plaintiff in that case, therefore, failed to "produce proof of a fact or a series of related facts which warrant the inference of negligence." (*Brown v. Capital Transit Co.*, *supra*; *Sweeney v. Erving*, 228 U. S. 233; 57 L. Ed. 815).

Defendant also cites *Connor v. Washington R. & E. Co.*, 43 App. D. C. 329, wherein the facts are not in point, but in which the law stated by the court supports plaintiff's position here. There the court said: "Had the car started with an *unusually violent jerk or jolt* the plaintiff could, under leave of the court, have amended her declaration and so alleged . . . Unless, therefore, an injury results from same *unusual jerk or swaying of the car* due to some act of negligence in its control, there can be no recovery." (Italics supplied)

The case of *Wichita Transportation Corporation v. Braly*, 150 F. (2d) 315, is almost directly in point with the instant case and, for that reason, is quoted below in detail:

"On November 28, 1942, at about three o'clock in the afternoon, one of appellant's busses in which appellee was a passenger, while traveling northward on Topeka Avenue, a thoroughfare in Wichita, Kansas, stopped at the curb to load and unload passengers and to await the change of the traffic signal at the intersection of First Street. With the change of the traffic light, the bus started north across the intersection and pedestrians started across First Street to the right of the bus. When a Ford Coach from the opposite side of the intersection made a left turn into First Street the bus driver suddenly stopped his bus to avoid a collision with the car, and appellee alleges that by causing the bus to come to a sudden stop, the driver failed to exercise proper care, as a result of which she 'was thrown with great force and violence against the seats and floor of said bus, causing her to suffer and sustain' the injuries complained of, and for which damages were assessed by the jury verdict.

"To support her allegations, appellee testified that upon boarding the crowded bus she was unable to find a seat and was standing in the aisle near the rear door holding to a handrail when the bus started moving into the intersection. That after the bus had traveled a short distance, it was stopped 'real sudden' and she was thrown up to the floor and the woman standing behind was thrown forward upon her back. She did not know what caused the bus to stop—that it 'wasn't going very fast' but it 'was a real sudden quick stop, enough to throw that woman down on me.'

"After instructions, about which appellant did not complain, and in answer to submitted interrogatories, the jury found that the driver was compelled to bring the bus to a 'sharp, unusual and violent stop' in order to avoid a collision with the Ford Coach as it made a left turn across the intersection, but that the driver was negligent 'in failing to keep a reasonable lookout and anticipating the act of the driver of the automobile,' and that such negligence was the proximate cause of the injuries. . . .

"We start with the rudimentary principle that while a common carrier is not an insurer of the safety of its passenger, it is held to a high degree of care, commensurate with the particular hazards involved. *Picou v. Kansas City Public Service Co.*, 134 P. (2d) 685; *McQuin v. Santa Fe Trail Transportation Co.*, 122 P. (2d) 787; *Miller v. Kansas City Public Service Co.*, 15 P. (2d) 453; *Oppenheim v. Toye Bros. Yellow Cab Co.*, 7 So. (2d) 420. Making application of this standard of care, it is said that a passenger assumes the natural consequences of normal jerks as a part of the ride in a public conveyance, but a 'sharp, unusual and violent' stop is evidence from which a legitimate inference of negligence may be inferred. *McQuin v. Santa Fe Trail Transportation Co.*, *supra*; *Dempsey v. Market Street Ry. Co.*, 142 P. (2d) 929; *Waite v. Pacific Gas & Electric Co.*, 132 P. (2d) 311; *McIntosh v. Los Angeles Ry. Corp.*, 59 P. (2d) 959. See also Mark Shaines' *Res Ipsa Loquitur*, Presumptions and Burdens of Proof, p. 457.

"In our case, the jury was fully justified from the facts and circumstances in finding that the stop was 'sharp, unusual and violent,' and it is a generally understood and accepted rule in cases of this kind, that the fact of the unusual and violent stop is factually sufficient within itself to establish a *prima facie* case in favor of the passenger who is injured by reason thereof, and to cast upon the appellant the duty of showing that such stop was caused by circumstances beyond the control of the driver while exercising the highest degree of care and caution. *McQuin v. Santa Fe Trail Transportation Co.*, *supra*; *McIntosh v. Los Angeles Ry. Corp.*, *supra*; *Jackson v. Capital Transit Co.*, 38 A. (2d) 108.

"Thus, the appellee established a *prima facie* case by showing that she was a passenger on the bus and

that she was injured by a sudden and violent stoppage of it. The appellant sought to be relieved of liability for the injury by showing that the bus moved into the intersection traveling approximately three miles per hour in low gear, and that when the driver of the automobile, while moving directly in front of the bus suddenly stopped to avoid hitting a pedestrian, the bus driver exercised proper care in bringing his bus to as smooth a stop as possible to keep from hitting the car.

"The bus driver, however, does not acquit himself of the presumption of negligence arising out of the unusual and sudden stop by showing that he exercised proper care in bringing the bus to as smooth a stop as possible to keep from hitting the car. The crucial question here is not what he did after he was faced with the emergency—it is how he happened to become involved in it. *Oppenheim v. Toye Bros. Yellow Cab Co.*, *supra*. Cf. *Tochek v. Monongahela Transport Co.*, 152 S. E. 776. Having been faced with the necessity of stopping the bus in a manner to cause injuries to the passengers, it became the duty of the appellant to show to the satisfaction of the jury that it did not negligently create or contribute to the creation of the emergency which necessitated the 'sharp, unusual and violent' stop.

"Whether the 'emergency' which required the sudden stop was created by the failure of the bus driver to keep a reasonable lookout and anticipate the acts of the driver of the automobile is not in our view in these circumstances a question of law but one of fact. The question was clearly and simply submitted to the jury upon this theory and by its verdict the jury said in substance that if the driver of the bus had kept a reasonable lookout he would have anticipated the act of the driver of the automobile and thereby avoided the necessity of the sudden stop which caused the injuries to appellee.

"It follows that judgment should be, and is affirmed."

See also:

Matsumoto v. Chicago & N. W. Ry. Co., 168 F. (2d) 496.

Murray v. Rio Grande Motorway, 171 F. (2d) 82.

United States v. De Back, 29 F. Supp. 141, affirmed in 118 F. (2d) 208.

Tilton v. Phila. Rapid Transit Co., 231 Pa. 63; 79 A. 877.

Defendant contends here, as it did so vigorously and unsuccessfully before the jury in the court below, that plaintiff testified falsely in other material particulars. These contentions should not require answer on appeal but will be answered below in the same manner as answered on the motion for a new trial:

1. Plaintiff did say she never had arthritis in her right foot before the accident (App. 43-44), and went on to testify she had never had any trouble with her right foot prior to this accident (App. 44). Like anyone else, plaintiff would not know whether she had arthritis, neuritis, bursitis, or any other disease unless it was diagnosed by a competent doctor and she was informed of it. There was testimony that plaintiff never had been advised that she had arthritis in her right foot prior to the accident (App. 149), and there was no testimony to the contrary. Further, there was testimony that hypertrophic arthritis would not necessarily produce pain (App. 152) and that many of us are unaware of such a condition "because it does not disturb us, does not bother us" (App. 152).

2. The plaintiff's statement that she was treated by Dr. Schwartze the night of the accident (App. 20, 21, 39) was fully substantiated by other evidence. Mrs. Schwartze, the doctor's widow, called as a witness for defendant, consistently advised defendant's counsel during her examination that the entry book which he had subpoenaed was not the only record book kept by the doctor, and only referred to "advance visits" to remind the doctor of his appointments (App. 85-87). The witness also said there were other records (App. 91) but she did not bring them with her, nor was she given a chance by defendant's counsel to find them (App. 90, 92). Mrs. Schwartze did state positively of her own knowledge that the Doctor did treat

plaintiff between July 9 and July 17 (App. 91-92), and that he saw her "many times" in that period (App. 92).

3. Defendant claimed at the trial, and alleges here, that Dr. Schwartz did not treat plaintiff "until July 18, nine days after the accident" (App. 39), which was "the day after Mr. J. P. White said he called on her to investigate the accident" (Defendant's Brief, Pg. 14). We wonder how such a contention can be advanced by defendant in charging plaintiff with perjury when defendant's own exhibit "C", purportedly a statement taken from plaintiff by defendant's investigator on July 17 states "*I went to Dr. Schwartz* and he took some x-rays and he doesn't know whether it is broken or not" (App. 83-84).

4. With respect to the rest-room falls at her Government Office, plaintiff did testify that she had a fall after the accident when she was on crutches (App. 25). We see no inconsistency, nor did the jury, in the fact that she had had a prior fall in the rest-room in April, 1946 due to wax collecting on her shoe. The fact that an official report was made of the prior fall only, furnishes no reason for this defendant to charge plaintiff with perjury.

5. Plaintiff did deny flatly ever having seen the medical report form which was allegedly sent the plaintiff and which was returned to defendant by Dr. Schwartz (Defendant's Exhibit "E", App. 41, 97-98) and there was no credible evidence to contradict her. In the first place, the report was admittedly in the doctor's handwriting except for one word, "supervisor", which was inserted at an unknown time. Secondly, there was no evidence that the report was completely filled out when the word was inserted. Thirdly, plaintiff testified that her daughter dealt with Dr. Schwartz when she was confined at home and that the daughter also could have dealt with defendant's investigator, Mr. White (App. 162-163). Fourthly, there was no credible evidence that the word was in plaintiff's handwriting. The testimony of the alleged handwriting expert, Ira N. Gullickson, on this point was completely worthless. He testified that

to compare a signature, as he did, with a totally different word, it was "problematical" whether they could be shown to have been written by the same person (App. 100). He further said that a person's handwriting changes over a period of years (App. 100-101). Then this expert admitted he used the signature as a basis for comparison with a different word, and that, as another basis for comparison, used a document admittedly written by plaintiff in 1941 to compare with a single word written in 1947. (App. 101) He finally made the ridiculous statement that he formed his professional opinion as to the author of the word "supervisor" in defendant's Exhibit "E" after a casual comparison with a signature written in 1941, while he was shown the two documents in the corridor of the courthouse (App. 100, 105) and then said "That is about all this required" (App. 105). A review of excerpts from the remainder of Mr. Gullickson's cross examination (App. 101-108) does not leave much doubt of the weight which his opinion was properly given by the jury.

Defendant says that plaintiff's counsel fought long and vigorously to keep the sight of the medical report, defendant's exhibit E, from the jury. The reason is obvious when we consider that defendant seized upon one word in an inadmissible document as the indirect means of getting complete hearsay before the eyes of the jury (App. 98, 108, 147-148).

Defendant further contends that plaintiff had a peculiar pride in her position as supervisor and, therefore, she must have made the change on the medical report. There was not an iota of evidence, except by defendant's counsel's remarks, that she took particular pride in this title, whereas the fact was not disputed that she held the position of supervisor.

6. With respect to the testimony of Mr. J. P. White, who said that he took a signed statement from plaintiff regarding the facts of the accident, he was supposedly an experienced investigator with 6 years experience, and a lawyer (App. 73), but he did not witness the plaintiff's signature

(App. 78), although the signatures of all other witnesses in defendant's file of the case had been witnessed (App. 82-83); and he apparently did not even concern himself with what the bus driver or other witnesses had to say about the accident before going to see the plaintiff herself (App. 78-79); and he did not attempt to make a part of the plaintiff's signed statement certain crucial and damaging admissions she allegedly made to him orally at the same time the statement was taken (App. 77-78). It is no wonder that the testimony of this "experienced investigator" was not believed by the jury.

There is no sound basis for the unwarranted charge by defendant's counsel that the plaintiff willfully testified falsely about anything. It is realized that, confronted with a good case of liability and serious injuries, possible impeachment of the plaintiff was the so-called tactical line of defense which defense counsel took in an attempt to escape a substantial verdict or to reduce its amount, but that fact does not excuse the unsupported and slanderous accusations which have been made in defendant's brief. We might add that the question of credibility was for the jury (*Old Dominion Stages v. Connor*, 67 App. D. C. 158; 90 F. (2d) 403; *Walford v. McNeill*, 69 App. D. C. 247; 100 F. (2d) 112; *McCartney v. Holmquist*, 70 App. D. C. 334; 106 F. (2d) 855; *B. & O. R. R. v. Corbin*, 73 App. D. C. 124; 118 F. (2d) 9; *Hiscox v. Jackson*, 75 U. S. App. D. C. 293; 127 F. (2d) 160), and the Trial Court, who observed the witnesses and heard the verbal testimony, did not find the plaintiff so unworthy of belief as to grant a new trial. (See *Capital Traction Co. v. King*, 44 App. D. C. 315, 320).

B.

There Was No Prejudicial Error Committed During the Trial.

1. (a) Defendant, not satisfied with accusing the plaintiff of perjury, has accused plaintiff's counsel of intentionally injecting insurance into the trial. Aside from the fact that plaintiff's counsel have had sufficient experience

in the trial of negligence cases to see no purpose in such a tactic, especially in a case of *res ipsa loquitur* where a large local bus company is the defendant, there is nothing in the record to support this allegation. We do perceive, however, the reason why it is made. In the case of *Capital Construction Co. v. Holtzman*, 27 App. D. C. 125, cited by defendant, a reversal was ordered because of the persistent and flagrant attempts on the part of plaintiff's counsel to bring out insurance. A reading of the opinion discloses that the Court had no alternative but to declare a mistrial because of plaintiff's attorney's conduct. So, in the case of *Garee v. McDonell*, 116 F. (2d) 78, 79-80 (CCA-7), the court said:

“Generally, where prejudicial error has been declared, it is found to have been due to some misconduct or improper remarks or questions of counsel, oftentimes repeated, and calculated to influence or prejudice the jury.”

The fact is, however, that in both the instances cited by defendant the record shows that plaintiff's counsel did everything possible to avoid the mention of insurance until the Court had first ruled upon the admissibility of testimony which might have brought out that subject. Under the applicable decisions, as will later be shown, counsel had a perfect right to ask Mr. J. P. White the name of his employer, but, nevertheless, in an abundance of caution, he still advised the witness not to answer until the Court ruled (App. 70). And in respect to the reference to the initials “J.R.B.”, when that question was asked, plaintiff's counsel was engaged in an inquiry as to whether statements taken by investigators in the presence of a witness ordinarily bore the names or initials of the investigator taking the statement (App. 82), thereby impeaching or reflecting upon the weight to be given to the testimony of Mr. White as to his claim that he took a signed statement from the plaintiff but failed to witness it (App. 80-81). In this connection, it was perfectly proper to show that “J.R.B.”, who apparently witnessed Mrs. Augusti's statement, was a fellow employee of Mr. White, and that he had followed the usual

practice of witnessing a statement which he had taken. As for Mr. J. Reid Bradley himself, we know that he is not as widely known as defendant seems to think, especially to a jury of laymen, all but one of whom had never been involved in an accident claim. Defendant's insinuating reference to the juror who had a Workmen's Compensation claim is unfair. Defendant's counsel knows, as do we, that this juror's claim was investigated by counsel pending the filing of the record on this appeal, and it was found that this juror's compensation claim had no connection whatever with either Travelers Insurance Company or J. R. Bradley.

When plaintiff was asked if she had ever seen Mr. White personally she replied "No, sir, I never did. I did call the office of the Travelers Insurance . . ." and plaintiff's counsel was the first to interrupt her (App. 163) and tried to drown the answer out by a question (App. 164). Nevertheless, the plaintiff's response, as conceded by defendant's counsel at the bench, "was purely voluntary and not in response to anything that was asked" (App. 164). Consequently it would not warrant a mistrial.

In the case of *Gleaton v. Green*, 156 F. (2d) 459 (CCA-4), the Court, speaking through Judge Dobie, after referring to the general rule concerning the mention of insurance in a tort action, went on to say:

"This rule should not be extended, however, to permit the party to obtain a mistrial merely because a witness very incidentally interjects a casual and ambiguous reference to insurance into an unresponsive answer. In such cases the usual procedure is that the judge will instruct the jury to disregard the testimony and strike it from the record. *Vollington v. Southern Paving Construction Co.*, 166 S. C. 448, 165 S. E. 184.

 "Under these circumstances, we are convinced that it was not error to deny defendant's motion for a mistrial. Where such a remark is the only basis for a mistrial, and where there is nothing in the record to show that the jury was in any way influenced by the remark or, in fact, even conscious of it, we believe that a mandatory requirement that a mistrial must be granted would only serve to obstruct justice rather than insure an impartial determination of the controversy.

"This leaves to be disposed of only the question whether, having denied the motion for a mistrial, the judge should have gone ahead and instructed the jury to disregard the reference, either then or in his charge. Defendant contends that the judge's failure to do so was so prejudicial as to require us to remand the case for a new trial. We are unable to agree with this contention.

"We note again that defendant never asked for any such caution or instruction, though particularly accorded an opportunity to do so. And it is a matter of common knowledge that cautioning jurors to disregard certain testimony frequently only serves to attract their attention to it.

* * *

"In the Vollington case, *supra*, the failure of counsel to request a nonsuit or mistrial was held to constitute a waiver of his objections. As stated there: 'Having failed to do either of these things, he must be held to have elected to take his chances for a favorable issue of the trial, and therefore to have waived his objections. He cannot be heard to renew them on this appeal.' 165 S.E. at page 186. In our judgment, this rule is applicable to the instant case and defendant's failure to request any action other than the granting of a mistrial constitutes a waiver of his objection to the omission of any words of caution by the trial judge to the jury.

"Finally, we note that the practice of carrying public liability insurance has now become so general, especially with regard to local public carriers, as to become a matter of common knowledge. Accordingly, it does not appear that the casual reference here in question, even if noticed by the jury and interpreted in the light most unfavorable to defendant's case, told the members of the jury anything they probably did not already know."

So, in the present case, the answer was casual and not directly responsive, the defendant did not ask that the jury be instructed to disregard the reference; and there was certainly no prejudice in view of the fact that defendant is a large and well-known local carrier and, as a matter of common knowledge, is obviously able to pay any single judgment of this nature regardless of insurance protection. In fact, defendant is required by law, which the

jurors are presumed to know, to carry adequate insurance. (Title 49, Sec. 315, U. S. Code)

Further, in 56 ALR 1492, the annotator says:

“And as a general rule, it may be said that reference to, or statements of, the fact that the defendant carries liability insurance, which are not responsive to the questions asked of witnesses, and which could not have been anticipated by the counsel conducting the examination, are not deemed to constitute reversible error, if the trial judge promptly excludes the statements.”

As mentioned before, no such request for exclusion was made by defendant. And again, with respect to the knowledge of the jury in a case involving a defendant such as this, in the case of *Balaklala Consolidated Copper Co. v. Reardon*, 220 F. 584 (CCA-9), the Court said:

“It is not improbable that all intelligent jurors of the present day know, as a matter of common knowledge, that in the large majority of damage cases brought against mining and manufacturing corporations the real party in interest as defendant is an indemnity insurance company. There is little, if any, substantial ground for assuming that a juror of the class of men who are usually summoned in a Federal Court would permit such a fact to influence in any degree his verdict.”

We might add that, if such knowledge was considered common among jurors in respect to mining companies in 1915, it may certainly be considered so with respect to a public utility bus company in 1950.

In addition to the above, there is another good reason why the reference to insurance cannot be considered prejudicial. Since defendant's investigator, Mr. J. P. White, had previously taken the stand, plaintiff had a right at that time to interrogate him with reference to his employment to show his interest and bias. In such a situation the name of his employer could have been stated to the jury, and although the trial court did not permit the question, the jury did understand that Mr. White had investigated the case on behalf of the defendant (App. 71-72). Further,

the interrogation of this witness on direct examination had, not improperly, brought out numerous inferences of an investigative agency which had handled the case. We can see no difference as far as the jury was concerned whether defendant was a self insurer or carried insurance with another company—the fact that some investigative agency was involved made it plain that defendant was adequately equipped to handle personal injury claims.

Defendant has cited in its brief eleven cases involving references to insurance, not one of which is in point. In fairness to the Court, defendant should have cited the one case in this jurisdiction squarely in point and involving a situation, as here, where an insurance investigator was called as a witness. In *Paxson v. Davis*, 62 App. D. C. 146, 148-9, this Court said:

“We are of the opinion that no error is disclosed by these assignments. It is established law that as a general rule it is reversible error, in the trial of an action for damages for personal injuries suffered in an automobile accident, to permit the plaintiff to introduce evidence to show that the defendant is protected by liability insurance against such accidents. Such evidence, however, may be admitted where it is material as tending to establish an incidental fact in issue, as for the purpose of showing the interest or bias of a witness as agent of an insurance company, but, where it is so admitted, the court should caution the jury to receive it only for such purpose and not to consider it in regard to defendant's duty or liability to plaintiff.”

Defendant also fails to quote the following portion of the case of *Capital Construction Company v. Holtzman*, 27 App. D. C. 125, 138:

“ . . . At the most it was only permissible to prove, for the purpose of showing the bias of the witness Barrett, that he was an employee of the Fidelity & Casualty Company, and that that company had insured the defendant's elevator.”

The rule is well illustrated by the remarks of Judge Learned Hand in *Mideastern Contracting Corp. v. O'Toole*, 55 F. (2d) 909, 912, wherein he said:

"Nothing else which took place deserves notice except the cross-examination of a witness called by the defendant, which brought out that the defendant was, or might be insured. This happened because the defendant put in evidence a statement of one of the plaintiffs taken before trial. The witness who took it had to prove it, and on his cross-examination it appeared that he had been sent by an insurance company. *This was entirely permissible.* The defendant need not have put in the statement at all; when it chose to do so, it laid open to inquiry its authenticity, and that inevitably involved the relation of the person who took it. If he was in the employ of some one who stood to pay the judgment, it would certainly be unjust to suppress that connection; it makes no difference that this let in the fact that the real defendant was an insurance company. The plaintiffs were not responsible for that; they were only protecting themselves from an attack against the credibility of one of their number." (Italics supplied)

Since the jury had a right under the law to be informed that Mr. White investigated the case on behalf of an insurance company, which, in fact, would have been more specific than the trial court actually ruled they could be advised, because White was not then employed by the insurance company, we can perceive no error in the question as to his employment, or to the reference to "J.R.B.", or to the subsequent casual and unresponsive reference to "Travelers."

We, therefore, submit that there was no prejudicial error in any of the foregoing testimony. If defendant was so fearful of keeping insurance out of the case, why did it fight so vigorously to get its own Exhibit E before the eyes of the jury (R. 323), when it contained a time stamp reading "Washington Claim Dept." (App. 98-100, 108-110) The trial court, who was in the best position to determine the effect, if any, of this testimony on the jury did not find that the jury was unfairly prejudiced.

1 (b) To properly understand the plaintiff's testimony that her husband was mentally ill, reference must be made to defendant counsel's remarks to the jury in his opening statement. He there contended that the evidence would show that plaintiff lost a great deal of time from her employment prior to the accident. The plaintiff's answer during her direct testimony that prior to the accident she took time off to take care of her husband was a direct and honest reply and a rebuttal of defendant's contention. If such an explanation had not been given, defendant would certainly have made capital of its omission (App. 12-14). Furthermore, the jury was instructed by the court to ignore the reference insofar as it might create any sympathy (App. 14).

1 (c) For the same reason, it was perfectly proper for plaintiff to give an honest answer as to why she had not procured additional medical treatment for her ankle. The evidence showed that plaintiff needs an operation, which, of course, involves unusual expense (App. 114) and her answer was not only justified by the evidence, but again, the absence of explanation would have given the defendant an unwarranted advantage (App. 30-31).

In summary, the result of the trial may have been certain, as stated by defendant, but not because of any sympathy or prejudice arising out of the collateral matters mentioned above. Defendant was a local bus company and we are certain that, as a practical matter, no juror would be influenced, one way or the other, whether it carried insurance. As for sympathy, the serious nature of plaintiff's injury in itself, makes the other references to plaintiff's husband and her financial situation relatively insignificant.

2 (a) Defendant's statements regarding the pre-trial exhibit are completely misleading. The pre-trial order, dated April 27, 1949, provided that counsel had stipulated that the medical statements which were marked could be admitted in evidence without formal proof (App. 6). The only purpose for this stipulation regarding the report of Dr. Schwartz was because Dr. Schwartz had died in No-

vember, 1947, about one and a half years before the pre-trial was held (App. 84), and defendant's counsel was advised of this fact prior to entering into the stipulation (App. 26). The report itself when it was exhibited at pre-trial was the same as when it was introduced in evidence and contained the typed name "E. W. Schwartz" with no signature above. In addition, the report contained a footnote "Note: *Compiled* from Dr. E. W. Schwartz's records." This report was stamped as a pretrial exhibit and initialed by Judge Holtzoff. (Plaintiff's Exhibit No. 2, App. 176-177) How can defendant's claim that if they had known at pretrial that Dr. Schwartz had not made out the report himself, they would not have stipulated to it? The very fact that the signature was absent and that the footnote said it was a compilation answers any contention that it was represented to have been made by Dr. Schwartz. The Trial Court made this observation (App. 28). Furthermore, and this should be conclusive of the point, both at the pre-trial and the trial, the report was stapled to a letter, dated Jan. 14, 1948, stamped but not initialed by the pre-trial court which was addressed to one of plaintiff's counsel and signed by Mrs. Schwartz which says: "Enclosed herewith is copy of a report compiled from the records of Dr. Schwartz on the case of Mrs. Edith Maske" (App. 28).

In any event, we can see no merit in defendant's contention that the report was the "lay speculation of a boy". Plaintiff's counsel understood that the Doctor's son, who is also a doctor, made the compilation from his father's records and counsel so advised the trial court (App. 27). The accuracy of this compilation is strengthened by the fact that Mrs. Schwartz testified that the Doctor himself had even dictated a report of Mrs. Maske's treatment to his son in order to answer a letter she had written him (App. 91).

Finally, the admission of this report was in no way prejudicial to the defendant. Defendant states that plaintiff had access to the original records, but fails to admit that defendant's counsel was told at the trial that the records were in the possession of Mrs. Schwartz (App. 29), and

that if he thought there was any inconsistency between the doctor's original records and the compilation, he was welcome to bring the records to court and introduce them in evidence (App. 27), but defendant failed to do so. With respect to the prognosis mentioned in this report, the evidence showed that neither of the complications referred to therein had developed in plaintiff's foot and there is no reason to believe the jury was influenced by a prognosis made several years before trial rather than by what had actually developed. If defendant felt that this prognosis would be harmful, it could easily have limited its stipulation at pre-trial only to the remainder of the report.

The trial court properly found no undue prejudice in holding defendant to its pre-trial stipulation. On the other hand, if a withdrawal of the stipulation had been allowed defendant during the trial, then plaintiff would have been unduly prejudiced by being placed in a position in the midst of the trial where it would have been difficult to have otherwise produced the basic evidence upon which the Schwartze report was founded.

2. (b) With reference to exclusion of the Walter Reed Hospital record, defendant has studiously avoided any reference in its brief to the fact that these records were privileged and on this ground alone were clearly inadmissible. There had been no waiver of privilege in this case. (App. 139, R. 457). See Title 14-308, D. C. Code; *N. Y. Life Ins. Co. v. Taylor*, 79 U. S. App. D. C. 66, Footnote 6, Pg. 69.

Irrespective of privilege, however, the records sought to be introduced by defendant were replete with notes and observations that were subject to misinterpretation by defendant, with no real opportunity for plaintiff either to explain or rebut them. Most important, the records which defendant sought to introduce were the same type that this court referred to in *N. Y. Life Ins. Co. v. Taylor*, 79 U. S. App. D. C. 66, 74; 147 F. (2d) 297, where is said:

"The drastic impairment of the right of cross-examination resulting from the admission of this type of unsworn observation and opinion evidence will be

recognized by anyone familiar with the psychology of a jury trial. The unsworn psychiatric diagnosis would be introduced, with appropriate fanfare as to the distinguished character of the alienist who made it, but who is not called as a witness. The opposing party might have plenty of data to shake this testimony on cross-examination, yet he would have to remain silent while a strong *prima facie* case is made against him. The risk of perjury would be neatly avoided because the real witness is not sworn.

* * * * *

Only a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediate cross-examination which has always been regarded as the greatest safeguard of American trial procedure.

* * * * *

"The record that the patient took an overdose was a routine entry of a fact on which observers would not differ. But the excerpts from the patient's conversation reported by a nurse are no different from a newspaper reporter's account of an interview. They are made in the regular course of business in the colloquial sense but not as that term is intended for use by statute.

* * * * *

"Conversely where the accuracy of the entries depends on opinion, conjecture or judgment in selecting the particular entries from a larger mass of data which some other observer might consider equally relevant, the entries are not within the Rule regardless of motive.

* * * * *

The entire hospital records offered in this case are not before us. It may be that some of the entries are admissible. The test should be whether they are records of a readily observable condition of the patient or of his treatment."

With reference to plaintiff's prior injury to her left leg, plaintiff did testify that she had had an injury to that leg in 1929 in a gas explosion (App. 11, 32). Defendant's counsel made frequent comment about the fact that the hospital record admission note on history said the injury

had been incurred in a railroad accident (App. 139). What possible difference this made in deciding the issues of this case, we cannot conceive. As a matter of fact, it constantly appears in the trial of these cases in the court below that the hospital admission notes which are produced in court are frequently in error. Several months ago this counsel tried a case in which a hospital record said the plaintiff was injured on a streetcar—when actually it was a bus. It made no difference there; nor does it here. Such entries are made from scattered information, generally of a hearsay character, furnished under emergency conditions to nurses, clerks, internes, etc.

With reference to the same left leg, plaintiff did not, as defendant claims, give the impression that there was little wrong with her left leg before she went to Walter Reed. Defendant avoids mentioning that plaintiff also testified, "I was crippled pretty badly in that foot and I went to Walter Reed to see if they could do anything for me", (App. 32) and further testified that she wore a prosthesis on part of her left foot prior to going to Walter Reed (App. 150) (See also App. 93 and 110).

As indicated above, there was an adequate explanation for both points which defendant wished to raise to impeach plaintiff but they were nevertheless completely immaterial and collateral to the issues of the case and not relevant solely for possible impeachment (*Ewing v. U. S.*, 77 U. S. App. D. C. 14; 135 F. (2d) 633).

With respect to the radiologic report, defendant's statement that hypertrophic arthritis can be diagnosed on an x-ray as easily as a rash on the face is truly amazing. There are a number of cases familiar to doctors and lawyers alike where there have been complete disagreement as to whether or not x-rays have shown a fracture of a bone (R. 433-434); if such can occur, it would not seem unusual that competent radiologists could disagree as to a diagnosis of arthritic changes in a bone. For this reason, it would have been unfair to plaintiff to admit the report of this x-ray without any opportunity either to examine the doctor who made it, or to have the x-rays themselves diagnosed

by another radiologist. Radiology is a highly specialized branch of medicine, and we cannot agree that an x-ray diagnosis such as we find here is a "routine product of an efficient clerical system" or a "record of a readily observable condition of the patient or of his treatment" (*N. Y. Life Ins. Co. v. Taylor, supra*). As stated by this court in the *Taylor* case, "some diagnoses are a matter of observation, others are a matter of judgment, still others a matter of pure conjecture. The admissibility of records of such diagnoses must depend upon their character."

Even though this x-ray report was excluded from evidence, defendant's counsel somehow managed to bring to the attention of the jury the entire substance of the report and the jury could not help but understand that defendant had something of a documentary nature that plaintiff had a previously existing arthritic condition and tarsal deformity of her right foot prior to her accident (App. 119-120). Further, in a later question by plaintiff's counsel the jury was told that the plaintiff had the same condition shown by the Walter Reed x-ray report (App. 122). But, nevertheless, the evidence showed that an injury such as plaintiff received would have aggravated this condition to a great extent, even to the point of making the limb useless, whereas she had been able to walk fairly well theretofore, (App. 121) and that the pre-existing condition would probably have not required a fusion of the ankle, as was recently recommended by the plaintiff's doctor, (App. 117-118) had it not been for plaintiff's accident (App. 121). In view of the above, there was obviously no prejudice to defendant in excluding this x-ray report. In fact, the record is replete with testimony regarding plaintiff's arthritis, just as if the report had been admitted (App. 118-122; R. 434-446).

2. (c) There was no error in admission of the traffic regulation on "following too closely" (App. 165-166). Defendant says that this charge of negligence was not in the complaint or pre-trial order, but fails to acknowledge that it was offered by plaintiff in rebuttal (App. 164-165), and was, therefore, proper to be considered by the jury after

hearing defendant's attempted explanation of the accident. And the defendant's version of the accident, as testified by the bus driver, showed a clear violation of this regulation.

Defendant contends (1) that the regulation applies only to vehicles traveling in tandem, and (2) that there was no evidence that the bus and the taxicab ever travelled in tandem. Defendant is wrong on both points. There is nothing in the regulation to indicate that a vehicle must be *directly* behind a forward vehicle in order for the regulation to apply. Such an interpretation would be opposed to common sense and would make the regulation useless. The intent of the regulation is that vehicles shall not approach so closely to the rear of other vehicles on the public streets, considering their respective speeds, as to make it impossible to avoid colliding with the forward vehicle, or to avoid creating a dangerous situation to the rear vehicle and other vehicles on the street if the forward vehicle should be required to stop suddenly. This applies to vehicles in direct tandem as well as to those not in direct tandem but where a rear end collision would nevertheless be likely to occur.

The law is clear that unexpected stops on the part of a forward vehicle must be anticipated insofar as a driver approaching from the rear is concerned, and the regulation involved here was designed to provide for such a contingency. As stated by the annotator in 47 A. L. R. 703:

"The general rule is that, although ordinarily a signal warning vehicles in the rear is necessary when the vehicle in front is stopped, nevertheless there is imposed upon the operators of the rear vehicles the corresponding duty of having their vehicles under such control as to be able to stop in time to prevent running into the car ahead in case the latter vehicle comes to a sudden stop in case of an emergency or in obedience to traffic signals."

And in *Mandro v. Vibbert*, 170 F. (2d) 540, (CCA-4), Section 2154 (119) of the Virginia Code, which is almost identical with Sec. 34 of the D. C. Traffic Regulations was cited, and the court said:

“What is a ‘reasonable and prudent distance’ must, in each instance depend upon the particular facts involved. Except when reasonable minds cannot differ, what distance was required to be maintained and whether that distance was in fact maintained are questions for the jury.”

And in the case of *Cronin v. Shell Oil Company*, 8 W. (2d) 404; 112 P. (2d) 824, involving a similar statute, the Supreme Court of Washington approved an earlier case containing the following language:

“The conduct of the appellant was not the exercise of that care required of him while following the automobile. He had the right, of course, to follow traffic at a reasonable and safe distance, but he was also under the duty of reasonably governing his speed and maintaining such a reasonable distance back of the automobile and such reasonable lookout ahead as would provide for the contingency of the sudden stopping of the car in front of him.

With respect to automobiles, the rule in such cases is stated, generally, in 2 Blashfield Cyclopedic of Automobile Law and Practice (1935 Ed.) 94 Sec. 942, as follows:

‘A motorist has right to follow another motorist at reasonable and safe distance. However, he must govern his speed or keep back a reasonably safe distance so as to provide for the contingency of a car in front suddenly stopping, maintaining a proper lookout for the car immediately preceding him, and so that he can stop without a collision, or can turn out sufficiently to pass the vehicle in front without going across the street in the way of traffic approaching from the opposite direction as that will naturally result in collision with such traffic.’ ”

The evidence did indicate that there was traveling in tandem. Mrs. Page said the taxicab “cut around *in front* of the bus and kept on going” (App. 51). Mrs. Augusti said that when she saw the taxicab it was “directly in front of the bus” (App. 57, 58), and that the bus was so close to the taxicab she could only see that portion of the

rear of the taxicab extending from a little below the rear window to the top of the cab (App. 58). She further indicated the taxicab was in motion the entire time she saw it, and couldn't say whether it had ever stopped (App. 58-59). Mrs. Calder said that when she looked up, the taxicab was "directly in front of the bus" (App. 62). The bus driver testified that the taxicab "just pulled out and straightened up, straight east, and then it stopped" (App. 129), and later said that, when he applied his brakes, the taxicab was "heading straight east (App. 130), and finally, when the bus stopped, the taxicab was "sitting right in front of it" (App. 131). It is submitted that the above testimony is more than adequate to justify an instruction on "following too closely". In addition, although the bus driver stated that he was within 10-12 feet of the taxicab when he saw it pull out (App. 130), he indicated he was still 12 feet behind it when it stopped (App. 130, 133). He couldn't state how far the taxicab traveled from its parked position to where it stopped (App. 131, 134, 138). He admitted however that the taxi had straightened out on E St. just before it stopped (App. 133). The minimum distance the taxicab could travel to go from the parking lane to be heading straight east in the next lane would be one car length, and if that were all it had traveled, the bus, if it was only 10-12 feet to the rear at the time the taxicab pulled out, would certainly have collided with it. Therefore there must have been an appreciable time which elapsed to allow the taxicab to go from the curb to a position in front of the bus, and the bus driver did admit that "there was a period during which the taxicab was in front of (him) and (he) was aware it was stopping" (App. 135), but he "didn't know" how far behind the taxicab he was when they were both in motion (App. 136). Furthermore, the bus driver did not blow his horn (App. 129), did not swerve the bus (App. 53, 54), did not know whether he saw the rear stop lights of the taxicab go on (App. 133, 136) and approached within 10-12 feet of the cab before he even applied his brakes, and then stopped in 4 feet (App. 130). If the bus driver had slowed his bus during the time the

taxicab was pulling out from the curb into his lane of traffic, and after the taxi got in front of the bus, he would have been in a position to make a normal stop that would have avoided the accident. Instead he did exactly what the regulation was intended to prevent, and approached so closely to the taxicab that it was impossible for him to make a normal stop with safety to his passengers—and his foremost duty was to them. (*Bell Cab v. Coppridge*, 81 U. S. App. D. C. 337; 158 F. (2d) 540)

With defendant's evidence in such a state of uncertainty, and with the only positive testimony showing a distance of only 12 feet behind the two vehicles at any time, in the light of the bus' speed, we think it is obvious that the traffic regulation on "following too closely" was applicable to the case and was properly admitted by the trial court.

3. (a) There was no reversible error in the fact that the charge of the Court used the term "highest degree of care", patently, for the same reason that the charge of the trial court in *Hecht Co. v. Jacobson*, 86 U. S. App. D. C. 81, 180 F. (2d) 13, was approved. The Trial Court here did explain the term to the jury in the light of the facts of the instant case and in almost the identical language used by the Trial Court in the *Hecht Co.* case. The Court stated that "the highest degree of care means *reasonable care in the superlative degree*. In other words, a common carrier is bound to exercise all the care, skill and foresight *within reason practicable under the circumstances*. It is a rudimentary principle that while a common carrier is *not an insurer* of the safety of its passenger, it is held to a high degree of care *commensurate with the particular hazards involved*."

The refusal to grant defendant's prayer No. 1 was not error, for the reason that such an instruction standing alone is not a correct statement of the law, and, if not coupled with a review of the facts of the case and the obligations devolving upon a common carrier in relation to its passengers, would be open to the same objections which defendant advances here to the charge which was given.

We do not see the reason for defendant's attitude of shocked surprise and its reference to the "mystifying error" in the trial court's refusal to accept defendant's interpretation of the *Hecht Co.* case. Ever since that opinion was handed down, defendant's counsel, who represent several public utilities, have contended before many District Judges sitting in jury cases that that case outlaws the use of the term "highest degree of care", but not once has their contention been accepted. It is true that that opinion says, "But the possibility of confusion which may attend such a charge when not as well explained suggests the desirability of avoiding reference to 'degrees of care' ". However, the opinion does not abrogate the term "highest degree of care", nor does it say that use of the term "reasonable care under the circumstances" is, in itself, a sufficient substitute. The case of *Denver Consolidated Electric Co. v. Simpson*, 21 Colo. 371; 41 Pac. 499, cited in the *Hecht Co.* case does not say that, nor can such a holding be found in any other authority cited in the footnotes of the opinion in the *Hecht Co.* case. In fact, in the case of *R. R. Co. v. Lockwood*, 84 U. S. 357; 21 L. ed. 27, the Supreme Court specifically said:

"In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it strictly 'negligence', and this seems to be the tendency of modern authorities. *If they mean more than this, and seek to abolish the distinction of degrees of care, skill and diligence required in the performance of various duties, the fulfillment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed.*" (Italics supplied)

And earlier in the same opinion, the court acknowledged the rule that:

"In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their

important duties—an object essential to the welfare of every civilized community . . . In regard to passengers the highest degree of carefulness and diligence is expressly exacted . . . ” (84 U. S. at pages 377-378)

See also Cooley on Torts (4th Ed.) Vol. 3, Sec. 465, wherein the author says:

“But as there are committed to his charge for the time the lives and safety of persons of all ages and of all degrees of ability for self protection, and as the slightest failure in watchfulness may be destructive of life or limb, it is reasonable to require of him the most perfect care of prudent and cautious men, and his undertaking and liability as to his passengers goes to this extent, that, as far as human foresight and care can reasonably go, he will transport them safely.”

And see *Pistorio v. Wash. R. & E. Co.*, 46 App. D. C. 479, 484.

It is apparent, therefore, that the *Hecht Co.* case holds that, *within the “standards of care” or “degrees of care” imposed by law upon persons or firms occupying certain positions in relation to others*, each of such persons or firms are required only to exercise reasonable care under the circumstances. Thus, for example, the Hecht Company was bound to exercise only reasonable care under the circumstances, considering, however, its obligation with respect to operation of its escalators (potentially dangerous instrumentality) and its customers (anticipated presence of small children), to exercise the highest degree of care to prevent injury. So, in the case at bar, even though the defendant bus company may be required only to exercise reasonable care under the circumstances, these circumstances include the fact that it is a public utility being paid an adequate compensation to transport safely a member of the public who has little choice in the method of transportation and no choice whatever in the character of operation of such transportation, and make it incumbent upon defendant in the exercise of reasonable care under the circumstances to exercise the highest degree of care towards

such passenger, or as the trial court defined it "reasonable care in the superlative degree", "all the care, skill and foresight practicable under the circumstances", and "commensurate with the particular hazards involved" (App. 171-172). (*Pistorio v. Wash. R. & E. Co.*, *supra*; *Pacific S. Co. v. Holt*, 77 F. (2d) 192)

Defendant's argument that "the court's charge left the jury free to convict appellant of negligence for not creeping along E Street at one mile per hour is facetious, and defendant's reference to *Jackson v. Capital Transit Company*, 69 App. D. C. 147, 99 F. (2d) 380, involving a streetcar with a preferential right of way, and a pedestrian, rather than a passenger, is not in point. Any motorist must anticipate to some extent the sudden actions of other motorists, and the law requires that this be done (see 2(c), *supra*). The failure of defendant's bus driver, carrying a heavy load of standing passengers, to do so, is definitely negligence, and would be so even if he had been held only to exercise of a slight degree of care.

3. (b), (c). There was no error in charging the jury on the doctrine of *res ipsa loquitur*, and the court's charge correctly stated that doctrine. To answer defendant's contentions on this point, this was *not* a specific negligence case, and there was no attempt to make it one. Defendant, however, has sought to force plaintiff into this position so that defendant could claim that the evidence was not sufficient on these issues. Even if this case had been tried on specific negligence, the testimony of defendant's bus driver was sufficient to allow plaintiff to go to the jury on the bus driver's failure to keep a proper lookout, and failure to stay a reasonable distance behind forward vehicles (See 2(c) *supra*), but we need not consider this because plaintiff clearly relied on *res ipsa*. Just as in the case of *Safeway Stores v. West*, 86 U. S. App. D. C. 99, 180 F. (2d) 25, plaintiff here, after pleading in the alternative, abandoned any claim of specific negligence at pretrial and at trial. The only claim of specific negligence ever made at trial was in defendant counsel's arguments to the court.

Defendant next says that since plaintiff saw Mrs. Page step on her foot and since she was looking in front of the bus at the time of the sudden stop, that the facts were not peculiarly within the carrier's knowledge and *res ipsa* should not apply. This is an ingenious theory even though not correct. The doctrine is stated in *Safeway Stores v. West, supra*, to be that "when the cause of the accident is (1) known, (2) in the defendant's control, and (3) unlikely to do harm unless the person in control is negligent, the defendant's negligence may be inferred, without additional evidence." The fallacy in defendant's argument is the contention that the stepping on plaintiff's foot was the "cause" of the accident rather than the sudden stop of the bus. All of the evidence, including that introduced by defendant, who called Mrs. Page as a witness, conceded that the sudden stop of the bus was the "cause" of the accident, since Mrs. Page "had no control over stepping on plaintiff's foot," and her stepping upon plaintiff's foot "would have happened to any of us if we had been standing where (Mrs. Page) was" (App. 52). In view of this testimony, there can be no question of any intervening cause, and it needs no citation of authority to state that, merely because the operator of a common carrier does not personally observe the manner of plaintiff's injury, that the *res ipsa* doctrine can not apply.

The additional fact that plaintiff says she was looking out in front of the bus prior to the sudden stop should afford no comfort to defendant. It is true, as defendant says, that she saw no taxicab, but this is the very reason that she could not give any explanation for the sudden, abrupt, and violent stop of the bus. Defendant's argument assumes that a taxicab made a sudden stop directly in front of the bus, making it inevitable for the bus driver to come to an abrupt stop, without fault on his own part—but this is the very issue on which the jury did not believe the bus driver. The cause of this accident, i.e., the unusual and sudden stop of the bus, was known to the defendant, and the instrumentality causing the accident, i.e. the bus, was completely in defendant's control. The Court, therefore, properly applied

the doctrine of *res ipsa loquitur* (*Wichita Transportation Co. v. Braly, supra*).

The trial court did not, as defendant claims, go "completely astray" in its charge on the *res ipsa* doctrine. There is nothing in the charge which would lead the jury to believe that defendant was required to countervail the inference of negligence, or had the burden of proof to rebut it. The jury was instructed that the sudden stop was "evidence from which a legitimate inference of negligence may be inferred" but that "the burden of proof is upon the plaintiff to prove by a preponderance of the evidence, as that term has been defined for you, that the operator of the bus did not exercise that high degree of care in avoiding a perilous situation . . . or that when the operator was confronted with an unexpected crisis he failed to exercise that degree of care in bringing his bus to a stop . . .". The Court further advised the jury that if they found "that the plaintiff has failed to so establish *any one or more of the foregoing propositions*, or should you find that the evidence *upon any one or more* be evenly balanced, or that it preponderates in favor of the defendant, then the plaintiff cannot recover and, in that event, your verdict should be for the defendant. In order for the plaintiff to recover, she must *prove* that the plaintiff was negligent . . . negligence is never presumed but must be proved . . . The mere fact that an accident happened and that the plaintiff received some injury *is not sufficient* to permit the plaintiff to recover." (App. 172-173). It is clear, therefore, from a reading of the whole charge, that the jury was not instructed, as defendant claims, that the defendant was required to produce evidence to countervail the inference, or that the burden of proof shifted to defendant. The fact that some evidence was produced by defendant in explanation of the occurrence made it incumbent upon the court to advise the jury what consideration should be given to it in connection with the permissible inference. In other words, what defendant should produce, if it so desired, to meet the plaintiff's *prima facie* case. If this had not been done, the plaintiff would have been prejudiced.

The jury was specifically instructed that the inference did not, in itself, warrant a verdict for plaintiff and that the burden of proof remained upon the plaintiff. Further, as was done in the case of *Earle Restaurant v. O'Meara*, 82 U. S. App. D. C. 49; 160 F. (2d) 275, where a charge on the res ipsa doctrine was approved, the jury was instructed that the mere fact of the accident did not establish negligence or permit the plaintiff to recover.

Although there is a wealth of authority on the res ipsa doctrine, there are relatively few cases involving instructions on this doctrine. However, the majority of reported cases involving the specific wording of instructions thereon support plaintiff's position that the trial court's charge was a proper explanation of the doctrine.

In *San Juan Light & T. Co. v. Requena*, 224 U. S. 89, 56 L. ed. 680, the Supreme Court reviewed the following instruction of the lower court:

"And you are further instructed that if you believe from a preponderance of the evidence that the deceased came to his death while innocently and without knowledge of any danger using an incandescent light, the current for which was furnished, or to which the electricity was supplied, by the defendant company, the *presumption is* that the electric company was negligent; and *it devolves upon it* to show that the surplus and dangerous current that came over the wires did not occur from any negligent act on its part."

The Court then said:

"Exception to this instruction was taken upon the ground that it erroneously applied the doctrine of res ipsa loquitur. While recognizing that the doctrine is of restricted scope, and when misapplied is calculated to operate prejudicially, we think there was no error in its application in this instance These circumstances pointed so persuasively to negligence on its part that it was not too much *to call upon it for an explanation*. Of course, if the cause of the injury was one which it could not have foreseen and guarded against, it was not culpable; but in the absence of that or some other explanation there was enough to justify the jury

in finding it culpable. This was all that was meant by the instruction, reasonably interpreted. It was not a model, and, if it stood alone, might be subject to criticism. But, if read in the light of what preceded and followed it, and of the case before the jury, it was unobjectionable. When so read it rightly declared and applied the doctrine of *res ipsa loquitur*, which is, when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care. (Italics supplied)

And in the case of *Mudrick v. Market Street R. Co.*, 11 Cal. (2d) 724; 81 P. (2d) 950, 118 A.L.R. 533, three instructions of the trial court were reviewed in which the trial court had instructed the jury that "proof of an injury to a passenger on the car of a common carrier, caused by the (unusual) operation of the car, raised *the legal presumption* that the injury was caused by the negligence of the carrier and *casts upon* the carrier the burden of proving that such injury was caused by some unavoidable casualty or by some other cause which human care and foresight could not prevent, etc.", and that ". . . the law *presumes prima facie* that the particular thing thus shown to have caused the injuries was due to the defendant's neglect, and the burden is then *thrown upon* the defendant to establish that such injury was not caused by its neglect, etc." (italics supplied). The California Supreme Court said:

"It is further contended that these three instructions are erroneous for the reason that the words 'presume' and 'presumption' are used therein instead of the words, 'infer' and 'inference.' While it appears to be well settled that under the rule of *res ipsa loquitur* an inference and not a presumption arises on proof by plaintiff of the necessary facts (*Sweeney v. Erving*, 228 U. S. 233, 33 S. Ct. 416, 57 L. ed. 815 Ann. Cas. 1914D, 905; *O'Connor v. Mennie*, 169 Cal. 217, 146 P. 674; *Dowd v. Atlas Taxicab & Auto Service Company*, 187 Cal. 523, 202 P. 870; *Crooks v. White*, 107 Cal.

App. 304, 290 P. 497, and *Ireland v. Marsden*, 108 Cal. App. 632, 291 P. 912), these terms are often erroneously used interchangeably, and as conveying the same meaning. We find that many lawyers and courts as well make this same mistake. We question whether the ordinary layman, to say nothing of many members of our profession, clearly comprehends the difference in the meaning of these two expressions. While courts have frequently called attention to the erroneous use of the terms, 'presume' and 'presumption' in stating, the rule of *res ipsa loquitur*, no decision has been called to our attention in which a judgment has been reversed by reason of the erroneous use of these words. While it may be error, the error, in our opinion, has not prejudiced the defendants in any of their rights."

See also: 42 A. L. R. 865-872; 38 Am. Jur. 1074.

Defendant overlooks the fact that even though defendant is not required to produce evidence to meet the inference, the jury has a right to be told what defendant must show if it desires to explain away its own negligence, the burden of proof, nevertheless, remaining on the plaintiff.

In the leading case of *Sweeney v. Erving*, *supra*, the Supreme Court acknowledged that:

"* * * if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence . . . the application of the rule where it does apply, in raising a question for the jury, and thus making it incumbent upon the defendant to adduce proof if he desires to do so, has been sometimes erroneously confused with the burden of proof . . . In our opinion, 'res ipsa loquitur' means that the facts of the occurrence warrant the inference of negligence . . . that they call for explanation or rebuttal, not necessarily that they require it." (italics supplied)

The charge of the court here fairly advised the jury, not that defendant's evidence was required, but that evidence from defendant was called for, and, having been produced—did it show the exercise of the proper degree of care on the part of defendant in explanation of the plaintiff's prima

facie case and the inference of negligence which the jury was permitted to draw.

CONCLUSION.

It is respectfully submitted that the doctrine of *res ipsa loquitur* was properly applied by the court below and in doing so a prima facie case was made for a factual finding by the jury. Defendant's case not only failed to establish a good defense, but rather fortified the inference of negligence which the jury were permitted to draw from plaintiff's prima facie case. Accordingly, there was no merit in defendant's challenge of the sufficiency of the evidence on its motion for a new trial or judgment notwithstanding the verdict. Further, defendant's several claims of prejudice are both flimsy and unsound and do not warrant disturbing the judgment below. It is, accordingly, respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

ALVIN L. NEWMYER,
DAVID G. BRESS,
ALVIN L. NEWMYER, JR.,
Attorneys for Appellee.
Rust Building,
Washington, D. C.

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
District of Columbia Circuit*

No. 10,792

FILED JUN 1 1951

Joseph W. [unclear]

WASHINGTON, MARLBORO & ANNAPOLIS MOTOR LINES, INC.,
(Also known as W. M. & A. Motor Lines, Inc.) a body
corporate, *Appellant*,

v.

EDITH O. MASKE, *Appellee*.

**PETITION FOR REHEARING OR MODIFICATION
OF JUDGMENT**

Appellee respectfully petitions the Court to grant a rehearing and to modify the opinion handed down by this Court on May 17, 1951, and for cause therefor states as follows:

The opinion of this Court is completely at variance with the established rules of law relating to appellate review of findings of a jury on factual issues. The law governing the liability of common carriers has by the decision here, been thrown into a state of utter confusion. The opinion has caused considerable comment amongst members of the bench and bar, the substance of which is that its meaning and effect cannot be understood. It is certain that its confusing effect will be in-

tensified by the lapse of time and by its citation as authority for the proposition that a jury verdict is to be easily set aside where credibility of witnesses is argued.

Without attempting to reargue the points presented in the briefs and confining this petition strictly to the issues on which the decision rested, appellee respectfully submits that the decision entirely overlooks one of the most important questions of fact that was necessary to decide and was decided by the jury in the court below. That fact is that the testimony of the bus driver himself was such that a finding of his negligence would have been warranted. This is so, even if his testimony had appeared on plaintiff's case, which was not necessary because both parties effectively conceded at the trial that plaintiff properly relied on the doctrine of *res ipsa loquitur*. The defendant did not move for a directed verdict at the end of the plaintiff's case—and evidence of the inference permitted by the doctrine, not only warranted but required the submission of the case to the jury.*

If we admit every conclusion adopted by this Court in its review of the evidence, i.e. that the bus was going at a moderate speed, that a cab cut in front of the bus and stopped suddenly, that the plaintiff, if she was looking, should have seen the cab; that the plaintiff was relatively uncertain as to the presence of a cab; nevertheless, the opinion wholly fails to consider that the sudden stop which the bus admittedly made may have been due to the sole or concurrent negligence of the bus driver, *irrespective of whether or not a cab cut in front of the bus*.

The opinion states that "the chief question of fact at the trial was whether the sudden stop was (1) unnecessary

* *Sweeney v. Erving*, 228 U. S. 233, 57 L. ed. 815; *Hohenthal v. Smith*, 72 App. D. C. 343, 114 Fed. (2d) 494; *Capital Transit Co. v. Jackson*, 80 U. S. App. D. C. 162, 149 Fed. (2d) 839; *Haw v. Liberty Mutual Insurance Co.*, 86 U. S. App. D. C. 86, 180 Fed. (2d) 18; *Safeway Stores v. West*, 86 U. S. App. D. C. 99, 180 Fed. (2d) 25.

and negligent or (2) necessary to avoid collision with a taxicab that turned suddenly across the path of the bus". But assuming the truth of (2) above, the opinion fails to recognize that the sudden stop could, nevertheless, have been negligent and violative of the duty owed plaintiff by defendant. As stated by the Circuit Court in *Wichita Transportation Corporation v. Braly*, 150 Fed. (2d) 315, a case almost on all fours with the instant one:

"The crucial question here is not what he did after he was faced with the emergency—it is how he happened to become involved in it . . . Whether the 'emergency' which required the sudden stop was created by the failure of the bus driver to keep a reasonable lookout and anticipate the acts of the driver of the automobile is not in our view in these circumstances a question of law but one of fact. The question was clearly and simply submitted to the jury upon this theory and by its verdict the jury said in substance that *if the driver of the bus had kept a reasonable lookout he should have anticipated the act of the driver of the automobile and, therefore avoided the necessity of the sudden stop which caused the injuries to appellee*". (Italics supplied)

Similarly, this Court said in the case of *Bell Cab Company, Inc. v. Coppridge*, 81 U. S. App. D. C. 337, 158 Fed. (2d) 540, where a taxicab company was held liable to a passenger notwithstanding the fact that a private automobile which collided with the taxicab clearly violated a traffic regulation:

"The jury had a right to conclude, as it did, that the extraordinary care due from a taxicab driver required either that he stop, or that he be prepared to stop almost instantly should the other car fail to observe the stop sign and so fail to yield the right-of-way".

Although defendant's bus driver in the instant case was a complete blank on most of the critical facts of the accident (Appellee's brief, page 4), his only positive testi-

mony was sufficient to hold him guilty of negligence. He testified on direct examination as follows:

"I had stopped for the red light there at 6th Street and when it turned green, I went on across the intersection. I didn't shift gears until I crossed the intersection because we were taught in school never to attempt to or to shift gears while you are traversing an intersection. The bus had cleared the intersection when I did shift to second gear.

"*Just about that time*, a taxicab, a black taxicab, privately owned, driven by a colored woman, pulled out from the curb and stopped right in front of me. At that time, I was in the center lane on the right hand side of the street. That left one traffic lane open eastbound on the left of me and there was a parking lane to the right of me. When the cab pulled out, I came to an abrupt stop. I jammed on the brakes" (App. 123-124).

He later testified that the cab was parked at the curb in front of Georgetown Law School in the middle of the block when he first observed it (App. 126-127, 131), and relating this testimony back to his prior testimony above, the bus was just leaving the intersection of 6th St. at that time.

It is apparent, therefore, that the bus driver had the taxicab under observation for half a city block after it left the curb, but, nevertheless, stated that he was within ten to twelve feet of it before he suddenly applied his brakes (App. 130). This is the very reason the trial court admitted into evidence the traffic regulations on "speed" and "following too closely", and instructed the jury on "proper lookout" (App. 172). We might add that, in the exercise of the highest degree of care, the jury had the right to find that the bus driver could have attempted to turn his bus into the empty eastbound lane on his left (App. 124), rather than make such an abrupt stop.

The jury's finding is indicative of the fact that they found that defendant's bus driver failed to slow his bus in a normal manner when he first observed the taxicab leaving the curb (App. 124), that he failed to warn the cab by his horn that the bus was approaching (App. 129) (certainly required by the exercise of the highest degree of care), and that he approached within ten to twelve feet of the rear of the cab (App. 130), from which point he could not stop his bus with safety to his passengers when the cab stopped suddenly. These issues were thoroughly argued by counsel and covered in the charge of the Court (App. 172).

Ordinary motorists are required in the exercise of reasonable care to provide for the contingency of sudden stops on the part of forward vehicles (47 A. L. R. 703, 2 Blashfield Cyclopedic of Automobile Law and Practice (1935 Ed.) 94, Section 942); a common carrier is held to an even higher degree of care in such circumstances, and the jury's finding on these issues was fully supported by defendant's own evidence.

The decision of the Court further fails to consider that plaintiff established a prima facie case under the doctrine of *res ipsa loquitur* by proof of a sudden stop, as to which there was complete agreement in the testimony. Irrespective of whether the bus was going at a moderate speed, or whether another vehicle may have contributed to the accident, the testimony proving the sudden stop should still be sufficient to avoid the directed verdict which this Court says should have been granted. (*Wichita Transportation Company v. Braly*, supra, *Murray v. Rio Grande Motorway*, 171 Fed. (2d) 82, *Matsumoto v. Chicago and N. W. Railway Co.*, 168 Fed. (2d) 496, *Capital Transit Company v. Jackson*, 80 U. S. App. D. C. 162, 149 Fed. (2d) 839). If the case was required to be submitted to the jury, how then can this court reverse, without remanding the case for a new trial.

The opinion of the Court in the instant case next states that:

“It was proved beyond reasonable doubt, although appellee denied that she had told her doctor the ‘bus and an auto almost had a collision’ ”.

It is respectfully submitted that there was not an iota of testimony that plaintiff made the above-mentioned statement to her doctor. The very most which could have been shown by defendant’s evidence was that the medical report form filled out and submitted to defendant’s insurance company by plaintiff’s doctor contained the aforementioned statement, and that on that same form a word had been changed from “clerk” to “supervisor”, which word, a hand writing expert (thoroughly discredited on cross-examination and disbelieved by the jury) said was in plaintiff’s handwriting. This was not proof beyond a reasonable doubt or even substantial proof that plaintiff made the statement to her doctor. The doctor was deceased and could not testify at the trial, but even if, for the sake of argument, plaintiff had made this statement to the doctor, it is equally inferable that it was information she obtained later from other passengers on the bus or from the defendant’s insurance company. It certainly was not proof as to what she herself observed at the time of the accident, although that latter inference is the only one drawn by this Court in holding that her testimony was “uncertain”, and, therefore unsubstantial.

The jury had ample opportunity to examine all of the evidence, and to see and hear all of the witnesses, as did the trial court, and neither the court nor jury arrived at the conclusion which this Court has reached on this point. In the case of *Capital Transit Company v. Grimes*, 82 U. S. App. D. C. 393, Judge Edgerton, in his dissenting opinion, makes the following statement:

“The Supreme Court has repeatedly reversed appellate courts that overturned jury verdicts supported by evidence as this court is doing in this case.

In a recent case of this sort the Supreme Court said: 'The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury . . . Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function that a different conclusion would be more reasonable . . . And where, as here, the case turns on controverted facts, and the credibility of witnesses, the case is peculiarly one for the jury.' *Ellis v. Union Pacific Railroad Co.*, 329 U. S. 649, 653. This court's disregard of these principles in the present case goes to the authority of the Supreme Court as well as the integrity of the jury system."

In the opinion here it is further said that:

"The jury in a particular case may not be unreasonable in believing the one and disbelieving the others. But in view of appellee's relatively uncertainty on the witness stand, particularly in view of her contradictory statement to her doctor, we must conclude the verdict lacks substantial support."

What is it that the jury believed from plaintiff's version of the facts? The quotation in the opinion from her testimony relates only to whether there was a taxi in front of the bus and we know of no requirement that she as a passenger must explain all the circumstances of the accident. On the contrary she is not expected to be on the lookout as to the management of the bus or other vehicles (*Capital Transit Co. v. Jackson*, supra). There was other testimony that the taxi was moving the entire time and never did come to a stop (App. 51, 53), and also that the taxi was different in appearance from the driver's description (App. 59). On liability, it is submitted the jury probably believed that there was a taxi that pulled out from the curb, but the bus driver was negligent never-

theless. The jury and trial judge could see and hear the driver and it was apparent that he was hedging on cross-examination and not disclosing all the facts. His testimony was almost completely negative rather than positive (appellee's brief, pages 15-16) and any jury would have returned a verdict for the plaintiff under the circumstances. Even assuming this Court can reverse, how can it sit as a jury? Would not justice, in these circumstances, be better attained by having the verdict of another jury?

In conclusion, we respectfully submit that for this Court to overturn a verdict of a jury because of the "relative uncertainty" of a witness' testimony is contrary to years of precedent and established law. We know of no similar case, but, on the contrary, are familiar with repeated declarations on the part of the Supreme Court of the United States and other appellate courts criticizing the practice of invading the jury's function in cases where much less than "uncertainty" on the part of a witness was accepted by the jury. In *Lavender v. Kurn*, 327 U. S. 645, 90 L. ed. 916, 922-3, the Supreme Court said:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion.

"And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

And in the case of *Myers v. Pittsburgh Coal Co.*, 233 U. S. 184, 58 L. ed. 906, 911, the Supreme Court said:

“Unless the testimony was such that no recovery can be had upon the facts shown in any view which can be properly taken of them, the verdict and judgment of the district court must be affirmed.”

And in *Haupt v. United States*, 330 U. S. 630, 91 L. ed. 1145, 1153, the Supreme Court said:

“When enough has been shown to make a case for the jury, we may not impeach the verdict by differing from them on equally reasonable views of a witness’ meaning.”

And in *Corinne Mill, Canal & Stock Company v. Alexander Toponce*, 152 U. S. 405, 38 L. ed. 493, 494, the Supreme Court said:

“It is unnecessary to refer to the testimony which tends to weaken the scope of these general statements of the plaintiff and the foreman, because such conflict presents but a mere question of fact, upon which the verdict of the jury is conclusive.

“It is unnecessary to consider the contradictory testimony or to attempt to determine the actual facts in reference to this matter. It is enough that the jury by their verdict have practically affirmed the truth of plaintiff’s story.

“... While the evidence to sustain this verdict is not entirely satisfactory, and while, if submitted to this court originally on the printed testimony, a different conclusion might possibly be reached, yet, the jury having found for the plaintiff on part of his claim and the judge who heard the case in the court below having refused to set the verdict aside, we do not think it is so far unsupported by the evidence as to justify this court in doing so.”

And in *Tennant v. Peoria & Pekin Union R. Co.*, 321 U. S. 29, 88 L. ed. 520, 525, the Supreme Court said:

“It is not the function of a court to search the record for conflicting circumstantial evidence in order

to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable . . . That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Finally, in *Chicago and Northwestern Railway Company v. Gus B. Ohle*, 117 U. S. 123, 29 L. ed. 837, 839, it was said:

"It is not for us to decide that the jury brought in a wrong verdict under a correct charge, if the record shows, as it does, that there was some evidence to support the finding which was made."

We respectfully submit that the decision of the Court in the instant case is contrary to numerous decisions of the Supreme Court as announced above and that, upon reconsideration, this Court will wish to modify its judgment and affirm the judgment of the lower court in favor of the plaintiff, or at the least, award plaintiff a new trial.

Respectfully submitted,

ALVIN L. NEWMYER

DAVID G. BRESS

ALVIN L. NEWMYER, JR.
Attorneys for Appellee

We certify that the foregoing petition is presented in good faith and not for the purpose of delay. We further certify that three copies of this petition were personally served upon Frank F. Roberson, Esq., attorney for appellant, this 1st day of June, 1951.

ALVIN L. NEWMYER

DAVID G. BRESS

ALVIN L. NEWMYER, JR.